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No.

In The

Supreme Court of the United States

October Term, 1994

GRUPO PROTEXA, S.A. A COMPANY ORGANIZED UNDER THE LAWS OF THE REPUBLIC OF MEXICO, AND CONDUX S.A. DE C.V., A COMPANY ORGANIZED UNDER THE LAWS OF THE REPUBLIC OF MEXICO,

Petitioners,

vs.

ALL AMERICAN MARINE SLIP, A DIVISION OF MARINE OFFICE OF AMERICAN CORPORATION, A NEW YORK CORPORATION, AFIA, A DELAWARE CORPORATION, AND CIGNA, A DELAWARE CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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250 pp

QUESTIONS PRESENTED

Petitioners, Mexican corporate citizens, were ordered by the Mexican government to raise and remove their wrecked vessel which sunk in Mexican offshore oil fields. The government acted: (i) to remove an environmental and commercial threat to the oil fields and surrounding waters and shores; (ii) to conduct a criminal investigation into the cause of the loss; and (iii) to effect the removal of the bodies of 27 Mexican citizens trapped in the hull. Petitioners had insurance policies with the Respondents for expenses incurred in removing wrecks, "when such removal is compulsory by law."

After notifying the insurance carriers of the loss and the removal order, Petitioners complied with the removal order. After the removal was completed, Petitioners presented a claim for the monies due from the underwriters. Petitioners sued when, several months after the removal operation was completed, Respondents for the first time claimed that the removal order was invalid and therefore the removal was not "compulsory by law." The courts below refused to adhere to traditional principles of comity, or to apply the act of state doctrine and concluded, despite conflicting expert opinions, that the removal order was not valid under domestic Mexican law. The questions presented are:

1. Is it error for a U.S. district court to review *de novo* a determination by a foreign government of its authority under its law to issue a coercive removal order with respect to a shipwreck in waters subject to its jurisdiction?

2. Is the official act of a foreign government within its own jurisdiction which is consistent with international law and United States policy entitled to binding effect in United States courts as to all persons who were in a position to cause its validity to be litigated at the time of its occurrence?

3. Is the Third Circuit Court of Appeals correct in holding that both comity and the act of state doctrine apply only to the official acts of foreign governments within their own jurisdiction where there is also proof of a threat to the conduct of foreign relations by the United States executive and legislative branches of government?

4. Did the Third Circuit's refusal to apply the act of state doctrine abrogate Petitioners' vested contractual rights in violation of the Fifth Amendment to the Constitution?

5. Does a facially valid governmental order create legal compulsion so as to satisfy the requirements of the insurance contract here in question, notwithstanding an American court's determination eight years later that it was technically invalid under Mexican law?

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Third Circuit are listed in the caption.

CORPORATE PARTY'S AFFILIATION

Petitioner Grupo Protexa, S.A. is the parent company of Petitioner Condux S.A. de C.V. Petitioners have no other parent companies, subsidiaries (other than wholly-owned subsidiaries) or affiliates.

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OPINIONS BELOW

The opinion of the District Court denying Petitioners' and Respondents' cross-motions for summary judgment is unreported. (Appendix F, *infra,* pp. 198a-216a.) The first trial opinion of the District Court is reported at 753 F. Supp. 1217. (Appendix E, *infra,* pp. 143a-197a.) The first opinion of the Court of Appeals is reported at 954 F.2d 130. (Appendix D, *infra,* pp. 120a-142a.) The second opinion of the District Court, after remand from the Court of Appeals, is not reported. (Appendix C, *infra,* pp. 66a-119a.) The second opinion of the Court of Appeals is reported at 20 F.3d 1224. (Appendix B, *infra,* pp. 3a-65a.) The order of the Court of Appeals denying Petitioners' request for a rehearing is unreported. (Appendix A, *infra,* pp. 1a-2a.)

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 1994. (Appendix B.) A timely suggestion for rehearing *in banc* and petition for rehearing was denied on April 28, 1994. (Appendix A.) This petition for certiorari is being filed within the prescribed period of ninety (90) days after April 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

This case did not turn on any international or United States constitutional provisions, treaties, statutes, ordinances or regulations. It turned solely on the determination that under federal common law an act of the Mexican government was invalid under Mexican law. It is not necessary to cite the pertinent articles of Mexican law because Petitioners, though not agreeing, do not challenge the court's analysis of Mexican law. Petitioners maintain that under traditional principles of comity and the act of state

doctrine which has constitutional underpinnings, and the Due Process Clause of the Fifth Amendment, the lower courts should have found the governmental act was valid under Mexican law.

STATEMENT OF THE CASE

A. The Policy.

Respondents, two insurance companies, were among a group of seven underwriters that issued a Protection and Indemnity insurance policy to Petitioners covering a fleet of vessels. Under the Policy (SP-23), Respondents were obligated to indemnify Petitioners for all costs and expenses of, or incidental to, the removal of the wreck of any of the vessels when such removal was "compulsory by law."

B. The Wreck.

On December 14, 1985, Petitioners' vessel, the Huichol II, sank, during a storm, in one of the oil fields being developed by the Mexican national oil company (PEMEX) off the coast of Mexico in the Bay of Campeche adjacent to the Gulf of Mexico. At least 27 seamen — all Mexican citizens — died in the wreck. Their bodies were trapped in the Huichol when it sank.

The Huichol sank approximately 50 miles off the Coast of Mexico, and therefore well within Mexico's 200-mile Exclusive Economic Zone ("EEZ"). Under Article 56 of the United Nations Convention on the Law of the Sea, Mexico has exclusive jurisdiction in the EEZ for purposes of regulating all activities related to its sovereign rights to explore, exploit, conserve and manage the natural resources in the EEZ.

In 1985, the Campeche oil fields where the Huichol sank contained more than 50 oil drilling platforms and were criss-

crossed with undersea high pressure gas and oil pipelines, many uncharted. The United States Defense Mapping Agency's "Sailing Directions For the Caribbean Sea" described the area as follows:

> Offshore oil fields are being extensively developed in the Bay of Campeche. Multiple drilling rigs, platforms and associated structures, sometimes unlit, may be encountered anywhere in the area. Numerous pipelines, many uncharted, exist within the oil fields, and between them and the shore.

Within the oil fields there is a zone containing a particularly dense concentration of pipelines, platforms and other structures related to the oil exploration activities. This zone is marked "ANCHORAGE PROHIBITED" on all recognized nautical charts. The "ANCHORAGE PROHIBITED" zone is treated by the Mexican government as an "area of extreme safety." The Huichol sank not only 150 miles inside Mexico's EEZ, and not simply in the middle of the Campeche oil fields, but 1.5 miles *inside* this particularly sensitive area.

C. Removal Ordered By Mexican Government.

On December 17, 1985, the General Director's Office of the Mexican Merchant Marine ("Marine Mercante"), which is the functional equivalent of the United States Coast Guard, acting through the local Port Captain, Captain Rebolledo, issued a written order to Petitioners. The United States District Court for the District of New Jersey found that the order was an official act of the Mexican government directing Petitioners to immediately raise and remove the wreck. There has been no appeal from this finding. The removal order cited three articles of Mexican maritime statutes as the legal authority for its issuance.

Because the wreck was located in an "extreme safety" area, the Mexican government considered it to be an environmental and commercial threat to the oil fields, underwater pipelines, and surrounding waters and shores. This concern was heightened by the fact that the hurricane season was rapidly approaching.

In addition, the Mexican "Procuraduria General De La Republica" ("PGR"), which is the functional equivalent of the United States Justice Department, ordered an investigation into the cause of the casualty. Under Mexican law, the Port Captain is required to cooperate and assist the PGR in such investigations. The PGR asked Captain Rebolledo to order that the Huichol be raised so that the investigation could be completed.

There were intense social and political pressures for the removal to be completed without delay. The family members of the dead seamen were putting intense pressure on the government (including a visit by the President of the Republic himself) to effect the recovery of the bodies of their loved ones and to investigate the cause of the loss. The media was providing extensive coverage of the situation which was a national tragedy. Representatives of the Mexican Congress visited the Port Captain's office to insure that the removal operation was being undertaken expeditiously.

D. Underwriters' Notice and Agreement.

On the day after the sinking, all seven of the underwriters on the insurance policy were informed of the incident. They immediately dispatched a surveyor/adjuster to the site to represent their interest. The same day that the removal order was delivered to Petitioners, a copy was given to the surveyor/adjuster, the representative of the insurance carriers. He concluded that it needed to be complied with without delay and informed Petitioners to that effect. The surveyor/adjuster remained on site for the entire removal operation. He never once suggested to Petitioners that the

underwriters whom he represented had concerns regarding the validity of the removal order, or of the necessity to comply with it.

Petitioners submitted a proposal to the underwriters for doing the removal operation themselves. Five of the seven underwriters on the Policy directed Petitioners to immediately begin the operation on the terms proposed in order to minimize any further liability. Respondents' only response was to suggest that Petitioners get third party salvors involved as much as possible. If Respondents had concerns regarding the validity of the removal order, they had a contractual right under the terms of the Policy at that time to ask Petitioners to make further inquiry into its validity or to make a challenge to it in the Mexican courts. They never did.

With full knowledge of all of the underwriters, including Respondents, Petitioners commenced compliance with the removal order. Respondents, apparently concerned over the efficiency of Petitioners' removal operation, sent an additional surveyor to the site with instructions to assist Petitioners as needed and ensure Petitioners were aware of Respondents' concerns, if any, about the removal operation. Respondents' specially appointed surveyor arrived eleven days after the removal order was issued. During his entire time on the site, he, like the surveyor/adjuster, never questioned the validity of the removal order, or the necessity of complying with it.

In sum, despite complete knowledge of what was happening during the entire removal operation, neither Respondents' on-site representatives nor the home-office representatives ever queried the validity of the removal order, or suggested that Petitioners should make further inquiry into its validity or challenge it.

E. Final Adjustment — "Invalidity" Claim.

Upon completion of the removal, Petitioners presented a

claim on the Policy to the underwriters' adjuster. He adjusted the claim and approved it for payment. Five of the seven underwriters on the Policy paid their share. Respondents did not. They requested confirmation of the Port Captain's authority to issue the order. Following established administrative procedures, Petitioners requested an opinion from the government on the issue of the Port Captain's authority. In 1986 the following opinion was received from the office of the Marine Mercante, and forwarded to Respondents. It stated in pertinent part:

> According to the file, it is clear that the Port Captain of Cd. del Carmen, Campeche, had ground to intervene [citations omitted].
>
> * * *
>
> It is important to point out that article 86 of the Law of Navigation and Maritime Commerce in force, gives the Port Captain sufficient attribution to order removal of the wreck when at his judgment, it troubles the general waterways of communication.
>
> Concerning this matter the order from the Port Captain is completely justified by the following reasons among others:
>
> a) There is a great number of gas and oil pipelines, as well as drilling platforms and other oil installations in the areas in which the B/M "HUICHOL" sank.
>
> b) There is a significant traffic in said area, particularly of ships performing repair and maintenance works in the platforms, pipelines

and other installations, so besides navigation, it performed diving operations, welding, removal of pieces etc.; these activities are been made in the surface as well as inside and in the bottom of the sea.

Due to the foregoing this General Direction of Merchant Marine confirms the legal obligation of Condux, S.A. de C.V. to rescue and remove the ship B/M "HUICHOL" derived from the order No. CP-3312-23-3350 dated December 17, 1985, issued by the Port Captainships of Cd. del Carmen, Campeche.

According to article 262 of the Law of General Ways of Communication, authorization is given to the Port Captain to intervene in the maritime accidents, as well as to perform assistance to the federal office of the government attorney, for which reasons he must integrate an investigation as wide as possible, in particular in this case in which several tens of lives were lost; thus, the removal in part was due because of the investigation of the accident itself, besides having been considered necessary for the reasons of heavy traffic and activities that are given in this area and the immediate danger that said wreck would bring for the navigation and the activities made in this area. Moreover, if the Port Captain's order had not been followed, said authority would have proceeded to remove the ship under his own authority, requiring the owner of the ship the payment of the corresponding costs, if the owner refused to

> make such payment . . . this, independently from the penalties that may proceed for the noncompliance of the order.

(Appendix F, *infra,* at pp. 203a-205a.)

Despite this unequivocal affirmation of the Port Captain's authority from the highest levels of the Mexican government, Respondents still refused to pay. Instead, for the first time since the removal order had been issued almost a year earlier, Respondents claimed that the order was "patently invalid" and that Petitioners should not have been complied with it. Petitioners brought this lawsuit in the United States District Court for the District of New Jersey. Jurisdiction was based on 28 U.S.C. § 1332.

F. Summary Judgment Motion.

After discovery, the parties cross-moved for summary judgment. Petitioners argued that under the act of state doctrine, the removal order, an act of the Mexican government, had to be treated by the American courts as a valid act. Petitioners also argued that under well settled rules of insurance contract construction a facially valid governmental removal order, even if ultimately proven to have been technically invalid, satisfied the plain meaning of the Policy language. Respondents countered with, *inter alia,* the argument that because the removal order was "patently invalid" and not backed by meaningful sanctions, no reasonable person would feel compelled to obey it.

The trial court flatly rejected Respondents' "patent invalidity" and "no sanctions" arguments, stating:

> It should be noted at this point that this court finds that [Respondents'] argument that the Order in the current action was so patently

> invalid on its face that no reasonable owner could believe that failure to comply with such would possibly expose him to any liability belied by the fact that [Respondents] themselves took several months to review the order trying to determine its validity. . . .[1] Here, [Petitioners] were presented with a formally drawn Order which had the official seal of the Port Captain attached.
>
> * * *
>
> In this action, the presence of a removal order from the Port Captain could certainly have created a situation in which a reasonable owner of a wreck felt that a present and unconditional duty existed. In general, failure to comply with a government order exposes one to sanctions for disobedience, i.e., fines, penalties, etc. Moreover, due to the "presumption of validity" which attaches to official acts, a party under a governmental or judicial order is not generally allowed to disobey such while questioning it. [Citations omitted]. This Court, therefore, agrees with the [Petitioners'] contention that it is legally meaningless for [Respondents] to claim, in hindsight, that the order or the sanctions which it threatened may not have been enforceable. The [Petitioners'] potential for exposure to liability must be viewed in light

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1. It was not until several months after the operation was completed that Respondents claimed to have obtained legal advice questioning the validity of the removal order. They refused, however, to produce the alleged legal opinion and still have not done so to this date.

> of the Port Captain's Order which certainly could be viewed as imposing a present and unconditional duty upon [Petitioners].

(Appendix F, *infra*, at pp. 214a-215a.)

Notwithstanding the court's acceptance of that rationale, which was then and remains to this day the essence of Petitioners' position, the trial court also denied Petitioners' motion on the basis that even if the order were valid, an insured would still have to demonstrate that it reacted reasonably to the Order in order to meet the "compulsion by law" threshold.

G. Trial I.

After a trial (*"Trial I"*), the court held that Petitioners were not entitled to coverage because: (i) the removal of the wreck was not "compulsory by law" because the costs of compliance outweighed the sanctions for disobedience, so Petitioners should have ignored the order, or challenged it if pressed; and (ii) Petitioners failed to act as a "prudent uninsured" in conducting the removal operation. (Appendix E.)

H. Appeal I.

The trial court's decision was reversed by the United States Court of Appeals for the Third Circuit (*"Appeal I"*). The Third Circuit held that: (i) if, as the trial court had assumed on the record before it, the Mexican government had issued a valid removal order, that would *per se* constitute legal compulsion; and (ii) the Policy provision containing a "prudent uninsured" condition pertained only to settlement of claims rather than coverage. It remanded for a new trial on all issues with instructions to make threshold determinations as to: (i) whether the removal order directed removal, and, if so, (ii) was the removal order valid (or

does the act of state doctrine mandate a presumption of validity). (Appendix D.)

I. Trial II.

The second trial ("*Trial II*") was essentially a battle of foreign law experts. The trial court determined that the Port Captain's order was a governmental order directing Petitioners to remove the wreck.[2] Despite that finding, the trial court refused to apply the act of state doctrine because: (i) the issue was of no interest to the Mexican government; and (ii) it would be unfair to respondents to apply the act of state doctrine, and the removal order was invalid under Mexican law. (Appendix C.)

J. Appeal II.

The Third Circuit affirmed ("*Appeal II*"). Ignoring the comity underpinnings of the act of state doctrine, it held that the doctrine did not apply because Petitioners had not submitted any proof that there was a threat to the conduct of foreign relations by the Executive and Legislative branches of the United States if the act of state principle were not applied. It also held that in order to meet the *per se* rule of coverage for removals undertaken pursuant to governmental order, the order had to be both facially and technically valid. (Appendix B.)

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2. Respondents never suggested at either trial that the removal order was not an act of state. In any case, at *Trial I* and *Trial II* the trial court heard testimony establishing that Mexico's jurisdiction over activities related to Mexico's sovereign rights in its exclusive economic zone is exercised through the port captains. That testimony led the trial court to conclude that "the Port Captain occupies a position of importance in the maritime industry *and speaks with the force of law.*" (emphasis added). Furthermore, in *Trial II, Respondents'* legal experts both admitted that an order issued by the Port Captain would be "an act with the authority of the Mexican government." There is no reasonable doubt the order was an act of the Mexican state.

K. Rehearing Request.

Protexa petitioned for rehearing and suggested rehearing *in banc*. It argued that the Third Circuit's requirement that only valid governmental orders create legal compulsion was not only in conflict with decisions of other circuits, but was also inconsistent with the Third Circuit's own "compulsory by law" precedent in *Appeal I*, and *East Coast Tender Service v. Robert T. Winzinger, Inc.*, 759 F.2d 280, 286 (3d Cir. 1985). The request and suggestion was rejected by an eleven to two vote.[3] (Appendix A.)

REASONS FOR GRANTING THE WRIT

The Third Circuit decision in *Appeal II* turns on the premise that notions of international comity, full faith and credit, and respect for a foreign sovereign, have been completely usurped by constitutional separation of powers considerations when undertaking an act of state analysis in a situation *not* involving international law or public policy of the forum. The Third Circuit's distortion of the act of state doctrine treats foreign coercive orders as subject to collateral attack where domestic orders would not be. The Third Circuit's proposition conflicts with a long line of United States Supreme Court decisions from *Underhill v. Hernandez*, 168 U.S. 250 (1897), through *W.S. Kirkpatrick v. Environmental Tectronics*, 493 U.S. 400 (1990). There is also conflict and confusion among the circuits and among international law scholars on exactly this issue.[4]

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3. One judge voting for rehearing was Judge Becker, the author of *East Coast Tender* and a member of the Protexa Appeal I panel.

4. For a discussion of the role of comity in act of state cases, including a review of the pertinent Circuit and Supreme Court precedent, *see* Gregory H. Fox, *Reexamining the Act of State Doctrine: An Integrated Conflicts Analysis*,

(Cont'd)

Nevertheless, when a case turns, as did this case, on the validity of a foreign sovereign's act under the sovereign's own law, as opposed to international law or public policy, there is almost a century of unwavering Supreme Court precedent that requires the Court to treat that act as lawful under the local law. If the Third Circuit's decision in this case is allowed to stand, that precedent will be flouted, comity will be undermined if not eliminated altogether, and the American legal system will be viewed as becoming parochial and lacking legitimacy in the international legal system. Simply put, New Jersey district court judges should not be telling the Mexican government that its acts, directed towards protection of its citizens and natural resources under its jurisdiction, are illegal under Mexican law.

The misunderstanding of the Third Circuit not only distorts the act of state doctrine and the whole of comity, but has a substantial imput on insurance contracts for maritime purposes and perhaps others. Indeed Petitioners have been deprived of their unambiguous rights under the insurance contract in violation of the Due Process Clause of the Fifth Amendment to the Constitution.

Moreover, the Third Circuit's ruling that only governmental orders determined by United States courts to be valid under a foreign government's law create legal compulsion conflicts with precedents of this Court, and that of other circuits, is contrary to a

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(Cont'd)
33 Harv. Int'l L.J. 521, 527 (1992) (assumes Supreme Court has "replaced the comity rationale with separation of powers concerns"); Steven R. Swanson, *A Threshold Test for Validity: The Supreme Court Narrows the Act of State Doctrine*, 23 Vand. J. Transnat'l L. 889 (1991) ("Proper application of the doctrine requires more sensitivity to the concerns of comity"); *see also* Nicholas deB. Katzenbach, *Conflicts On An Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 Yale L.J. 1087 (1956) (examines, *inter alia*, development of comity and act of state doctrine, and predicts development of a "political aspect" to doctrine *in addition to*, not as replacement for, traditional comity principles).

public policy that encourages citizens to obey governmental orders, and dramatically alters in favor of marine insurors the legal rights, obligations and expectations of parties to marine insurance contracts.

I. ACT OF STATE

A. A United States Court May Not Judge the Validity of the Act of a Foreign Government Within Its Jurisdiction Under Its Local Law.[5]

In the classic statement of the act of state doctrine, Chief Justice Fuller affirmed that traditional comity considerations require that

> [e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of the other within its own territory.

Underhill v. Hernandez, 168 U.S. 250, 252 (1897); *see also Ricaud v. American Metal Co.,* 246 U.S. 304, 309 (1918) ("when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision"); *Oetjen v. Central Leather Co.,* 246 U.S. 297, 303-04 (1918) (act of state doctrine rests "at last

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5. Comity, a doctrine with ancient roots, *Blad v. Bonefield,* 36 Eng. Rep. 992 (1674), springs from the notion that mutual respect between sovereigns for each other's legal systems will foster the development of an international legal system. An understanding of the act of the state doctrine is impossible without an understanding of comity and its vital role in the development of international law. *See generally* Fox, *supra* note 4, Swanson, *supra* note 4, and Katzenbach, *supra* note 4.

upon the highest considerations of international comity and expediency").

A well-established corollary to that doctrine is that American courts will not entertain challenges to the validity of the official act of a foreign sovereign *under the local law of that sovereign. Bernstein v. Van Heygen Feres Societe Anonyme,* 163 F.2d 246, 249 (2d Cir.) ("We have repeatedly declared, for over a period of at least thirty years, that a court of the forum will not undertake to pass upon the validity under municipal law of another state of the acts of officials of that state, purporting to act as such."), *cert. denied,* 332 U.S. 772 (1947). Judge Learned Hand expressed the rule as follows:

> When public officers of a foreign country perform official acts in avowed pursuance of their authority, the court of another power will accept these acts as lawful and will not undertake to examine their validity under the local law.

Union Shipping & Trading Co. v. United States, 127 F.2d 771, 774 (2d Cir. 1942); *Earn Line S.S. Co. v. Sutherland S.S. Co.,* 254 F. 126, 129 (S.D.N.Y. 1918) (Hand, J.) ("The act of another sovereign within its own territory is of necessity legal."), *aff'd,* 264 F. 276 (2d Cir. 1920); *Banco De Espana v. Federal Reserve Bank,* 114 F.2d 438, 443 (2d Cir. 1940) ("It has been squarely held that courts of this country will not examine the acts of a foreign sovereign within its own borders, in order to determine whether or not those acts were legal under the municipal law of the foreign state.").

The decision below turned solely on the determination that the act by the Mexican government was invalid *under domestic Mexican law. There was no suggestion that the act was contrary to international law or the public policy of the United States or that it*

deviated from widely held standards of morality.[6] To the contrary, both lower courts determined that the Mexican government was motivated by legitimate health, safety and policy concerns. It was clear error for the courts below to ignore comity, and decide a case based solely on the determination that the Mexican government did not know its own law when it issued the removal order.

B. Where the Act of State in Question Is Not Offensive to United States or International Law, Constitutional Separation of Powers Considerations Are Irrelevant.

The Third Circuit Court of Appeals seeks to avoid the act of state doctrine by saying that the Port Captain's order does not involve separation of powers and sensitive foreign policy considerations. But this point is irrelevant to the issue in this case, namely whether a United States Court can question the validity of the foreign act of state *under that foreign sovereign's control.*

Separation of powers concerns are only implicated when a challenge is made to the validity of a foreign act of state under international law, or on the basis the act is repugnant to the public policy of the United States. Under those circumstances, traditional comity principles may not preclude examination of the act, but because such inquiry may create political issues, separation of powers concerns might. But that is not the case here where the determination of the validity of the Mexican government removal order was solely under Mexican law. In fact, in cases like this one, where the foreign act in no way offends international law or United States public policy the case for adhering to comity is strongest.

The Third Circuit misinterpreted *W.S. Kirkpatrick v. Environmental Tectronics,* 493 U.S. 400 (1990), as standing for the

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6. In fact, there was compelling expert testimony that the order was valid under international law.

proposition that comity has no place in act of state methodology. Environmental Tectonics was the unsuccessful bidder for a Nigerian government contract and sued Kirkpatrick, the successful bidder, asserting, *inter alia,* that Kirkpatrick, bribed a Nigerian official to obtain the contract. Kirkpatrick raised the defense of act of state. The legal adviser to the State Department advised the Court that judicial intervention would not embarrass or interfere with the conduct of foreign affairs. Justice Scalia, writing for the Court, observed that in every act of state case the Court would have had to declare an official act invalid. Because there was no official act of a foreign sovereign, the Court held that an act of state was missing. Accordingly, the doctrine was inapplicable.

Justice Scalia noted that while at one time the act of state doctrine rested only "on the highest considerations of international comity and expediency," the doctrine has since evolved to include, as a consequence of the separation of powers, a sense that the Judicial branch shall not act when such action may hinder the conduct of foreign affairs.

The separation of powers underpinnings of the act of state doctrine developed in the context of governmental actions allegedly in violation of international law, usually the seizure of property located in the foreign state and seized in circumstances which would violate the United States' view of international law. When the foreign act was questioned in a United States court (usually because the property showed up in this country with a new owner), the courts have refrained from acting. This is not such a case, because no violation of international law is alleged and there is no potential dispute on that ground.

There is absolutely nothing in *Kirkpatrick* which suggests that the principles of comity should not be applied when no violation of international law or public policy is alleged. Conspicuous by its absence in *Kirkpatrick* is any attempt to overrule the prior opinions

of the Court applying the act of state doctrine to those circumstances or to restrict its application so as to eliminate the typical comity situation. In fact, *Kirkpatrick* expressly affirmed that "the policies underlying our act of state cases" are "international comity, respect for the sovereignty of foreign nations on their own territory and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations." 493 U.S. at 408. If anything, by refusing to expand the act of state doctrine, *Kirkpatrick* reconfirmed the international comity and respect for sovereignty roots of the doctrine, rather than eliminating those roots as suggested by the Third Circuit.

It could scarcely have been the Third Circuit's contention that *Kirkpatrick* did away with comity. Yet by insisting that act of state applies only to those official acts which violate international law or U.S. public policy and seemingly forgetting comity entirely, the Circuit appears to ignore the fundamental roots of the act of state doctrine. It is only when comity is challenged because of alleged violations of international law that the constitutional separation of powers analysis comes into play on the theory that courts should be cautious in giving offense to foreign sovereigns. Where the official act, as here, is inoffensive to either international law or United States public policy, it is entitled to respect in our courts. Under rules of comity it is no less an act of state and cannot be collaterally attacked; in essence, it is entitled to the same respect — the same faith and credit — as the act of a sister state.

The validity of the coercive order obviously could have been challenged in the Mexican courts, but there is no doctrine of U.S. law which requires judicial affirmation before the order is entitled to respect in our courts. Respondents did not need to be parties to the order to be bound by it. They had the contractual power and opportunity to insist that Petitioners question the validity of the order in Mexican courts at the time. Under United States law that was the only time and the only place that the validity of the

concededly coercive removal order could be questioned.[7]

The applicability of the act of state doctrine to the facts of this case can be seen most clearly if we assume that the official act had been questioned at the time and found valid under Mexican law by the Mexican courts. Would such a finding be binding on the Respondents, or would they, not having been formally parties to the Mexican action, still be entitled to question its validity through expert opinion when Petitioners attempted to enforce their judgment in the United States? Surely in those circumstances it would be improper to litigate a second time in a U.S. court depending on experts' opinions the validity of the act under Mexican law. If that is the case, then the Court of Appeals is simply saying that the validity of a foreign act of state is dependent on its having the imprimatur of a court (the highest court?) of that country. But that simply is not the law; the act of state cases assume the validity of the act of a foreign sovereign (untested in courts) within its own jurisdiction.

In sum, comity and respect for sovereignty required the courts below to treat the Mexican government's removal order as a valid act of state. There was no need to engage in a constitutional separation of powers analysis. The court's failure to recognize and apply the still viable doctrine of comity under the facts of this case, which turns solely on the validity of a foreign sovereign act under that sovereign's local law of a matter subject to its jurisdiction, caused the Third Circuit's decision to be in direct conflict with every single act of state doctrine case decided by the Supreme Court from *Underhill* through *Kirkpatrick*.

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7. The Policy contained a "claims control" clause that gave Respondents the right and the responsibility to control the handling of the loss. Under this clause, Respondents had an absolute right, if they were concerned about the validity of the order, to require Petitioners to challenge the order in Mexican courts.

C. The Third Circuit's Failure to Recognize the Mexican Act of State as Valid Abrogated Petitioners' Vested Contractual Rights and Conferred a Windfall on Respondents.

By writing out of United States law notions of comity and international full faith and credit, the Third Circuit provided an unexpected and unbargained for windfall to all marine underwriters, including Respondents.[8] That might have been appropriate if Respondents had bargained for the right to collaterally attack the validity of foreign governmental acts before providing coverage — but that is just not the case. When setting premium rates, Respondents took into consideration that SP-23 would provide coverage for wreck removals undertaken pursuant to an order of a foreign government every bit as much as it would provide coverage for removals undertaken pursuant to an order of the United States government or a United States court. The severe restriction in coverage under SP-23 signalled by the Third Circuit unjustly enriches the Respondents who collected those premiums and abrogated Petitioners' vested contract rights in violation of the Due Process Clause of the Fifth Amendment.

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8. There was also uncontradicted trial testimony from a marine insurance expert that the Third Circuit's refusal to treat the removal order as illegally compulsive dramatically alters the expectations of parties to SP-23. In addition to SP-23, the other standard form of wreck removal coverage is what is referred to as "broad form" coverage which responds whenever an insured deems wreck removal necessary. Alex L. Parks, in comparing the various wreck removal coverages available in 1987 when he wrote his authoritative treatise on marine insurance commented that the difference between "broad form" and "compulsory by law" wreck removal coverage had become illusory because "the courts (particularly in the Fifth Circuit) had so liberally interpreted what is 'compulsory by law' that the question may almost be rhetorical." Alex L. Parks, *The Law and Practice of Marine Insurance and Average* 1034 (1987).

II. COMPULSORY BY LAW

A. A Facially Valid Governmental Order, Even If Technically Invalid, Satisfies the Criteria of the Insurance Contract.

Petitioners submit that a facially valid governmental order, *without more,* satisfies the threshold for insurance coverage under the wreck removal provisions of SP-23. SP-23, a pre-printed form which was offered to Petitioners on a "take it or leave it" basis, should be liberally construed in favor of coverage. *Ingersoll Mill Mach. Co. v. M/V Bodena,* 619 F. Supp. 493, 505 (S.D.N.Y. 1985); *Lake Charles Harbor & Terminal Dist. v. Imperial Casualty & Indem. Co.,* 857 F.2d 286, 288 (5th Cir. 1988) ("Doubts are resolved in favor of coverage."); *Employees Ins. of Wassau v. Trotter Towing Corp.,* 834 F.2d 1206 (5th Cir. 1988); *Oritani Savings & Loan v. Fidelity & Deposit Co.,* 989 F.2d 635, 642 n.3 (3d Cir. 1993); *see also Northbrook Excess & Surplus v. Proctor & Gamble,* 924 F.2d 633, 639 (7th Cir. 1991). The words of SP-23 should be construed in their "plain, ordinary and popular sense," *Progress Marine, Inc. v. Foremost Ins. Co.,* 642 F.2d 816 (5th Cir.), *cert. denied,* 454 U.S. 860 (1981), and in such manner as will give meaning to the reasonable expectations of the parties. *East Coast Tender Serv. v. Robert T. Winziger,* 759 F.2d 280, 286 (3d Cir. 1985).

It is well established that governmental orders, even invalid orders, constitute legal compulsion. This is not a case where the removal order was transparently invalid or had only a frivolous pretense to validity. Indeed, as discussed, *supra,* the trial court flatly rejected that precise argument. Furthermore, there was a sharp dispute between the experts whether the Port Captain had the authority to issue the order. It might be noted that the trial court could have reasonably believed the Petitioners' expert. Therefore, the removal order, even if it had been technically invalid, was nevertheless legally compelling and therefore fit the "plain, ordinary and popular" meaning of SP-23.

B. No Validity Requirement in Circuit Court Precedent.

The Third Circuit's holding that governmental removal orders do not, *ipso facto*, meet the "compulsory by law" threshold in SP-23 unless the order is judicially declared valid, is also contrary to all previous precedent on the issue, including Third Circuit precedent. Including *Appeal II*, there are six decisions from three different United States Circuit Courts of Appeals that have considered what constitutes "compulsory by law" as the term is used in SP-23. These cases are: *Grupo Protexa, S.A. v. All American Marine Slip*, 954 F.2d 130 (3d Cir. 1992); *East Coast Tender Serv., Inc. v. Robert T. Winziger, Inc.*, 759 F.2d 280 (3d Cir. 1985); *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365 (5th Cir. 1983); *Progress Marine, Inc. v. Foremost Ins. Co.*, 642 F.2d 816 (5th Cir.), *cert. denied*, 454 U.S. 860 (1981); and *Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.*, 461 F.2d 500 (2d Cir. 1972).

All three United States Courts of Appeals have said that the existence of a governmental order directing removal is *per se* "compulsory by law."[9] In addition to the *per se* rule, the Fifth and Third Circuits have adopted a "more expansive" interpretation, which employs a rule of reason whereby the term can encompass "additional cases" beyond the *per se* rule of a governmental order. (Appendix D, *infra*, at pp. 130a-136a.) According to these cases, it would be unfair and impractical to require shipowners to wait for the government to take action in order to obtain coverage, when failure to remove the wreck could expose the shipowner to

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9. The first court to speak of *valid* governmental orders was the Third Circuit in *Appeal I* — and that was only because on the record before it the trial had *assumed* a *valid* governmental removal order. Considering the expansive treatment of "compulsory by law" in *East Coast Tender*, the Third Circuit could not have intended to severely restrict coverage in *Appeal II* by creating a validity requirement — at least not without some stated rationale for doing so.

statutory, criminal, or third-party liability. *Bonanza*, 706 F.2d at 1369-70 ("The owner, and consequently its insurer, would be exposed to repeated damage claims without being able to rely on policy coverage to eliminate the hazard unless a governmental agency ordered removal."). Under *Appeal II*, however, the insured will not be able to rely on policy coverage even *after* the government directs the removal of the wreck. To obey the order, without first obtaining judicial approval of it, is to risk the possibility that years later (in this case eight years later in a courtroom in New Jersey), a judge may declare the order invalid. This is the only compulsory by law case where the government actually took direct action to force the owner to remove the wreck. To hold that even when faced with such a command the insured cannot be confident of coverage unless it can subsequently demonstrate that the order is valid, under local law, or that it took steps to challenge the validity of the order before complying, is contrary to the plain meaning of the policy language and serves no public purpose.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant its Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: July 27, 1994

APPENDIX A — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED APRIL 28, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5332

GRUPO PROTEXA, S.A., a company organized under the laws of the Republic of Mexico; and CONDUX S.A. de C.V., a company organized under the laws of the Republic of Mexico

v.

THE ALL AMERICAN MARINE SLIP, a Division of MARINE OFFICE OF AMERICAN CORPORATION, a New York Corporation; AFIA, a Delaware Corporation; CIGNA, a Delaware Corporation

Grupo Protexa, S.A., and
Condux, S.A. de C.V.,
Appellants

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 86-04212)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge,* and BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and LEWIS, *Circuit Judges,* and POLLAK, *District Judge**

*Honorable Louis H. Pollak, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

The petition for rehearing filed by the appellants, Grupo Protexa, S.A., and Condux, S.A. de C.V., in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Becker and Judge Hutchinson would grant rehearing by the court in banc.

BY THE COURT:

(Illegible)
Circuit Judge

DATED: April 28, 1994

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS, THIRD CIRCUIT DATED MARCH 29, 1994

GRUPO PROTEXA, S.A. a company organized under the laws of the Republic of Mexico; and Condux S.A. de C.V., a company organized under the laws of the Republic of Mexico

v.

ALL AMERICAN MARINE SLIP, A DIVISION OF MARINE OFFICE OF AMERICA CORPORATION, a New York Corporation; AFIA, a Delaware Corporation; CIGNA, a Delaware Corporation.

Grupo Protexa, S.A., and Condux, S.A. de C.V., Appellants.

No. 93-5332.

United States Court of Appeals,

Third Circuit.

Argued Feb. 4, 1994

Decided March 29, 1994.

Sur Petition for Rehearing April 28, 1994

* * *

Kenneth M. Van Deventer (argued), Riker, Danzig, Scherer, Hyland & Perretti, Morristown, NJ, for appellants.

Harold K. Watson (argued), Gregory F. Burch, Robin Beasley, Liddel, Sapp, Zivley, Hill & LeBoon, L.L.P., Houston, TX, David J. D'Aloia, Saiber, Schlesinger, Satz & Goldstein, Newark, NJ, for appellees.

Appendix B

Before GREENBERG and Roth, Circuit Judges, and POLLAK, District Judge*.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

This matter is before us on appeal from a judgment entered after we remanded the case to the district court when we reversed that court's prior judgment. The case involves claims by insureds under a marine insurance policy to recover the cost of removing their sunken vessel from a bay off the coast of Mexico. The policy covered costs for a removal of a sunken vessel if the removal was "compulsory by law." The insureds claimed they had acted under such compulsion because they were responding to an order to remove the wreck issued by the Mexican authorities. While certain of the several insurance carriers on the policy honored their claims, two denied liability. Thus, the insureds brought this action against those two companies. After a bench trial, the district court in a published opinion found in favor of the insurance companies on the ground that the removal was not "compulsory by law." In reaching this conclusion, the district court adopted an analytical framework not requiring it to determine the validity of the removal order.

The insureds appealed and we reversed the judgment of the district court, holding that it rested on incorrect conclusions of law. In particular we held that removal of the wreck would be "compulsory by law" if directed by a valid removal order. We then

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* Honorable Louis H. Pollak, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

remanded the case for further proceedings. At a second bench trial, the district court incorporated its findings from the first trial and received additional evidence, including expert testimony concerning the validity of the order under Mexican and international law. In a subsequent unreported opinion, the district court held that the act of state doctrine did not bar the court's inquiry into the validity of the order. It also held, in a determination the insurance companies do not challenge, that the order, which was ambiguous as to whether it required the removal, in fact included that requirement. Ultimately, however, the district court ruled in favor of the insurance companies, as it concluded that the order was invalid. The insureds again have appealed. We will affirm the district court's judgment, as we hold that the act of state doctrine does not bar our inquiry into the validity of the removal order, the order was in fact invalid, and there is no other basis on which we may conclude that the removal was compulsory by law.

II. BACKGROUND

In our earlier opinion, *Grupo Protexa, S.A. v. All American Marine Slip,* 954 F.2d 130 (3d Cir.1992) (*Protexa Appeal I*), we extensively recited the facts of the case as found by the district court in its published opinion following the first bench trial. *Grupo Protexta, S.A. v. All American Marine Slip,* 753 F.Supp. 1217 (D.N.J.1990) (*Protexa I*). Furthermore, as we have indicated, the district court incorporated its findings from *Protexa I* into its unreported opinion following the second trial. *Grupo Protexa, S.A. v. All American Marine Slip,* No. 86-4212, 1993 WL 166275 (D.N.J. May 12, 1993) (*Protexa II*). Therefore, many of the facts already appear in these two published opinions, so we freely will quote from them in setting forth the background of the case.[1]

1. In order to make our opinion more readable, we usually will omit quotations marks of the quoted material as well as citations to the underlying opinions. We also in some instances will make nonsubstantive changes in the language quoted.

Appendix B

The circumstances leading directly to this litigation may be traced to December 15, 1985, when the HUICHOL II (HUICHOL), a diving support vessel, sank with a large loss of life during a violent storm in the Bay of Campeche, an extension of the Gulf of Mexico, approximately 45 miles off the east coast of Mexico. The wreck of the HUICHOL came to rest 1.5 miles within the eastern border of the Petroleos Mexicanos' (Pemex) oil exploratory zone. Pemex is the Mexican national oil company. This area, though not Mexican territorial waters, is within the internationally recognized Mexican Exclusive Economic Zone, which extends 200 miles off shore. The HUICHOL was owned by Condux S.A. de C.V., a corporation owned by Grupo Protexa, S.A. (Protexa). Condux and Protexa are Mexican corporations and are the insureds under the policy involved in this case. Protexa is in the business of constructing and servicing the pipelines, platforms, and related structures needed by Permex, and develops and manages these projects through Condux. For convenience, we will refer to the insureds together as "Protexa."

The HUICHOL was insured under a marine insurance policy with several layers of coverage. Under the policy, five percent of the risk was placed with a Mexican insurance company, and four primary-layer underwriters were responsible for the first $2,500,000 of covered loss. The excess-layer underwriters were responsible for losses exceeding $2,500,000. The excess-layer underwriters were All American Marine Slip (AAMS), which carried 30% of the excess layer, various Lloyds/London underwriters, which carried 65% of the excess risk, and CIGNA/AFIA, which had 5% of the excess layer. The insurance policy contained a standard wreck removal provision covering expenses Protexa incurred in the "removal of the wreck of the vessel . . . when such removal is *compulsory by law.*" (emphasis added.)

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Protexa's insurance broker was notified on December 16, 1985, that HUICHOL had sunk the day before. The broker, acting as liaison between the underwriters and Protexa, then called in a specialized firm to survey the damage, adjust the loss, and prepare a written report for the underwriters. The representative from this marine surveying firm arrived at the wreck on December 16, 1985. On the same day, the insurance broker notified the underwriters on the policy, including AAMS and CIGNA/AFIA, that the HUICHOL had sunk and that it had called in the marine surveying firm.

When the marine surveying firm's representative arrived at the wreck he met with the various parties involved. Because the wreck lay in a Pemex zone of heavy drilling activity, and he believed that the Mexican government would want to remove the bodies of the deceased seamen and conduct an investigation, he concluded that the vessel would have to be removed. The broker then sent a telex dated December 17, 1985, to Protexa suggesting that if the wreck were to be raised and moved, an immediate investigation should commence to determine if the removal was compulsory by law. The telex advised that a valid order of removal would have to be in writing and be issued by an authorized governmental authority.

Immediately after the sinking, the Mexican Procuraduria General de la Republica ordered an investigation of the sinking. On December 17, 1985, the Port Captain for Ciudad del Carmen and the offshore port of Cayo Arcas issued a written order that, according to the English translation, required Protexa to post a bond "to guarantee the cleaning up of the area and the salvaging of [the] Vessel."[2] *Protexa Appeal I*, 954 F.2d at 132-33. Ciudad del

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2. We have repeated the full text of the order in the appendix to this opinion.

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Carmen is a city Carmen is a city on the mainland near the place where the HUICHOL sank.

Protexa's representative interpreted the Port Captain's order as requiring immediate removal of the wreck, and on the same day the order was issued, he so notified Protexa's insurance broker and requested an immediate meeting so that the broker could present the removal order to the underwriters. The insurance broker notified all the underwriters, including AAMS and CIGNA/AFIA, of the removal order. Protexa also wanted to present its proposal to perform the removal without resort to a third-party salvor.

The broker, the marine surveying representative and Protexa's representative met in Houston on December 18, 1985, where they agreed that the order appeared to require removal of the wreck and that Protexa's proposed removal plan was sound. The broker attempted to telephone the underwriters to discuss the proposed plan, but was able to contact only three of them, not including AAMS or the Lloyds/London underwriters. The broker explained to the underwriters the circumstances of the removal order and the need for beginning removal of the wreck without delay in order to minimize expenses. The underwriters he reached agreed to waive any requirement that Protexa obtain a second or third salvage bid, and advised that Protexa should begin work immediately to avoid further complications and costs.[3]

Protexa presented the underwriters with two alternatives regarding the costs of removal: (1) a fixed-sum bid to remove the wreck for $3,785,000 or (2) a daily rate of $224,608 for an

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3. Prior to this meeting and telephone contact with the underwriters, the broker sent Protexa a telex strongly suggesting that Protexa obtain at least one, and preferably two, outside bids for the salvage of the vessel. He also reminded Protexa of its obligation to act as a prudent uninsured.

estimated period of 24 days, resulting in a cost of approximately $5.4 million. The marine surveying representative sent these offers to the underwriters by telex on December 19, 1985, and the wreck removal operation began on that day. By December 20, 1985, all of the underwriters except AAMS and CIGNA/AFIA had agreed to the lump-sum bid predicated on there being a consensus in favor of this option. CIGNA/AFIA took no position, and AAMS, instead of accepting either of the alternatives posed by Protexa, responded by advising that all necessary steps should be taken to minimize the loss. Furthermore, AAMS expressed its desire to have a third-party salvor involved to the extent possible in the removal of the wreck. Inasmuch as AAMS and CIGNA/AFIA had not approved the lump-sum bid, the broker and the marine surveying representative told Protexa that it should consider the job to be on a day-rate basis.

On December 20, 1985, a Protexa staff attorney, Jorge Uriarte, whom Protexa chose to review the Port Captain's order, arrived in the port of Carmen. Upon his arrival he was told of the Port Captain's order, of the underwriters's approval of Protexa to raise the wreck, and of an imminent meeting with family members of the crew to announce that Protexa would be raising the wreck. Nevertheless, before Protexa started wreck removal, it wanted to rule out the possibility of a legal challenged to the order.[4] After a 45-minute review of the order and the statutes which defined the office of the Port Captain and the duties of his office, Uriarte concluded that "it was clear beyond a doubt that the order had to be complied with." Uriarte then visited the office of the Port Captain in an effort to obtain suspension or rescission of the order but was informed that any such relief would have to be sought from officials in Mexico City. He also was informed that the Port Captain expected removal to begin without delay or the navy

4. Protexa actually started removing the wreck before Uriarte reached Carmen.

would take over the removal and Protexa would be punished to the full extent of the law.

In addition to providing Protexa with an opinion as to the validity of the removal order, Uriarte listed five potential consequences that could result from noncompliance: (1) if Protexa did not begin removal of the vessel immediately, the Mexican government could arrange to have the wreck removed and present Protexa with the bill; (2) Protexa faced the potential for catastrophic liability to third parties for any damage resulting from movement of the wreck within the oil field; (3) Protexa would face potential sanctions or fines, which could be imposed on a sliding scale, for failure to comply with the removal order and to cooperate with the investigation; (4) Protexa risked forfeiture of the vessel and the bond; and (5) Protexa risked the destruction of its goodwill with the government and with Pemex if it failed to comply with the order. After concluding that the removal order was valid and, after weighing the potential consequences of non-compliance, Protexa decided not to challenge the order.

Although Protexa initially estimated that removal of the wreck would take about three weeks, the operation ran into several problems and progress was exceedingly slow. But Protexa lifted and suspended the wreck in a crane on February 10, 1986. Eventually, Protexa placed the wreck on the sea bottom in shallow water outside the oil exploratory zone.

After Protexa completed the removal, the marine surveying firm prepared its final proof of loss and forwarded copies to all the underwriters. The total adjusted loss was $12,121,726, with the first $2,500,000 paid by the primary-layer underwriters, thereby leaving a balance of $9,631,726, 5% of which remained with the Mexican insurer. The Lloyds/London underwriters, which

satisfied their portion of Protexa's claim, owed and paid 65% of the remaining 95% of $9,631,726. Thus, if liable, AAMS and CIGNA/AFIA respecticely would owe 30% and 5% of the remaining 95%. Both AAMS anc CIGNA/AFIA, however, denied Protexa's claim.

Protexa filed a complaint in the United States District Court for the District of New Jersey against AAMS and CIGNA/AFIA, and subsequently moved for summary judgment, contending that it could recover the removal costs because the removal was "compulsory by law." Relying on cases construing this standard policy language, Protexa argued that the Port Captain's order in itself established conclusively that the removal was compulsory by law. Protexa also maintained that the act of state doctrine precluded the court from questioning the Port Captain's authority to order the removal.

AAMS and CIGNA/AFIA filed cross-motions for summary judgment. They argued that the cases adopted a balancing test of reasonableness in which three factors: the likelihood of exposure, the sanctions for failure to remove, and the cost of removal, must all be examined in order to determine if removal was compulsory by law. Thus, they maintained that even a valid removal order would not show conclusively that removal was compulsory by law. They argued, however, that the Port Captain's order was invalid, and that therefore there was no likelihood of exposure to sanctions for failure to remove the HUICHOL. They also contended that the act of state doctrine was inapplicable, and thus that they could challenge the validity of the order.

In an unpublished opinion filed on August 26, 1988, the district court denied both motions for summary judgment. The case proceeded to a bench trial, following which the court, in *Protexa I* explained its interpretation of when removal is compulsory by law:

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> [T]he determination of whether removal of a vessel was 'compulsory by law' must be decided by looking to the state of affairs as they would appear to a reasonable owner under the circumstances and examining whether failure to remove a wreck would likely expose such owner to liability imposed by law sufficiently great in amount and probability of occurrence to justify the expense of removal. In other words, in this action, would a reasonable owner faced with the Port Captain's December 17, 1985 Order (the 'Order'), determine that failure to remove the HUICHOL would likely expose it to liability imposed by law sufficiently great in amount and probability of occurrence to justify the expense of removal.

Protexa I, 753 F.Supp. at 1230. Under this formula, the district court believed that the absence of governmental authority to order removal of the wreck would not be necessarily issue-dispositive but rather would be merely one of the factors the court would consider in determining whether removal of the HUICHOL had been compulsory by law. *Id.* at 1228. Consequently, the district court assumed without deciding that the Port Captain's removal order was valid, and the court did not confront the act of state doctrine. *Id.* at 1228.

Nevertheless the court held for the insurance companies, as it concluded that the removal was not compulsory by law under the foregoing formula. The court stated that "no phrase in the body of the [Port Captain's] order direct[ed] wreck removal." *Id.* at 1232-33. The court observed that the order instead merely required the posting of a bond. *Id.* at 1233. The court suggested that Protexa did not consider adequately the possibility of challenging the order. In

this regard it pointed out that inasmuch as Uriarte had no training in the applicable areas of law, did not obtain expert advice, and concluded that the order was valid after only cursory review, he was not prepared properly when he met with the Port Captain. *Id.* at 1233-34. In addition, the court found that the potential sanctions for noncompliance with the order and the potential liability to third parties were much less than the cost of removal. *Id.* at 1236. Furthermore, the court suggested that factors other than legal compulsion—pressure from the families of the deceased seamen and the possible commercial consequences of noncompliance—influenced Protexa's decision not to resist the Port Captain's order. *Id.* at 1232.[5]

Protexa then filed its first appeal to this court. We reversed the judgment of the district court and remanded for further proceedings. *Protexa Appeal I*, 954 F.2d 130. We first addressed whether removal of the HUICHOL was "compulsory by law," and in this undertaking we reviewed four opinions of courts of appeals interpreting the phrase as used in a standard clause in marine insurance contracts. *See Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.*, 461 F.2d 500 (2d Cir.1972); *Progress Marine, Inc. v. Foremost Ins. Co.*, 642 F.2d 816 (5th Cir.), *cert. denied*, 454 U.S.

5. The court also held for the insurance companies on a second ground. As we explained in *Protexa Appeal I:* "The court next held that even if the removal had been 'compulsory by law,' Protexa was not entitled to recover due to a policy provision that the court interpreted to mean that Protexa lost all right to recovery if it breached its duty to act as a prudent uninsured. The court found that Protexa violated this duty [w]hen [it] acted as its own salvor.' [753 F.Supp.] at 1237. Among other things, the court noted that 'Protexa had no experience in deep water wreck removal operations,' ignored AAMS' request that a third-party salvor be involved as much as possible, ignored bids by experienced salvors that were much lower than Protexa's costs, did not properly execute its removal plan, and failed to implement recommendations by an experienced salvor. *Id.* at 1237-39." 954 F.2d at 135. This ground of the district court's first decision is not at issue in the present appeal.

860, 102 S.Ct. 315, 70 L.Ed.2d 158 (1981); *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365 (5th Cir.1983); and *East Coast Tender Serv., Inc. v. Robert T. Winzinger, Inc.*, 759 F.2d 280 (3d Cir.1985). Ultimately, we determined that removal may be considered compulsory by law in any of three circumstances: (1) if it is directed by government order; (2) if it is required by statute or regulation; or (3) if "a reasonable shipowner at the relevant time would determine that the probable cost of removal would be less than the probable tort liability if removal was not undertaken." 954 F.2d at 138.

Consequently, we reversed the judgment of the district court because it had adopted a test different from our interpretation of the case law and had assumed the validity of the order and yet found for the insurance companies. Inasmuch as a removal directed by a government order is compulsory by law, we stated that "if the Port Captain's order in this case was a valid removal order, Protexa was entitled to recover under the policy provision in question." 954 F.2d at 138. We therefore remanded the case for a finding of whether the order required removal and a determination of the validity of the order.[6]

Inasmuch as we remanded the matter to the district court to determine the validity of the order, we did not pass on the insurance companies' contention that the Port Captain lacked the authority under Mexican law and under the United Nations Convention on the Law of the Sea (UNCLOS) to order the removal of the wreck.

6. Because it did not need to address the issue under the analytical framework it had adopted, the district court had not made the initial determination as to whether the removal order was in fact an order to raise the wreck, as opposed to an order merely to post a bond. In remanding on this issue, we noted that under Fed.R.Civ.P. 44.1, expert testimony may be introduced regarding Mexican law to aid the court in interpreting the Port Captain's order. *See Merck & Co. v. U.S. Int'l Trade Comm'n*, 774 F.2d 483, 488 (Fed.Cir. 1985).

Furthermore, we did not address the merits of Protexa's argument that the act of state doctrine precluded an American court from inquiring as to the validity of the Port Captain's order. The district court was to determine that issue, too, on the remand, on which it would also decide whether the Port Captain's order directed removal of the wreck. *Protexa Appeal I*, 954 F.2d at 139.[7]

On remand, the district court in its unpublished opinion, *Protexa II*, again found for the insurance companies. The court first

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7. However, we did note that "[t]he act of state doctrine does not preclude a court from determining whether in fact a government official directed certain action. *See [W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409, 110 S.Ct. 701, 706-07, 107 L.Ed.2d 816]; *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F.Supp. 1291, 1301 (D.Del. 1970) ('whether or not a foreign official "ordered" certain conduct is an evidentiary question' not prohibited by the act of state doctrine)." 954 F.2d at 139 n. 5.

The district court's second and independent reason, *see* footnote 5, *supra*, that Protexa did not act as a prudent uninsured, for entering judgment for the insurance companies is not at issue in the present appeal. However, in respect to this point, we held that the district court erred in interpreting a provision in the contract to mean that Protexa lost all right to recover any removal costs when it breached its duty to act as a prudent uninsured. *Id.* at 139-40. Instead, we found that the language relied upon by the district court appeared to refer only to the setlement of claims and not to the issue of coverage. *Id.* at 140. Therefore, although we held that the district court's findings that Protexa's removal operation was highly inefficient were not clearly erroneous, we stated that Protexa's inefficiency did not totally preclude recovery of removal costs. *Id.* at 141.

We stated, however, that "the policy provision on removal may well be restricted to reasonable removal costs, and it is not apparent from Protexa's briefs that it disputes such an interpretation." *Id.* at 140. Consequently, we also remanded for the district court to "determine the meaning of this provision and, if the provision is limited to reasonable costs, [to] make findings regarding the amount of those costs." *Id.* Of course, the district court on remand did not have to reach this issue.

made the now unchallenged finding that the Port Captain's order was a directive to raise the HUICHOL. The court further stated that "[w]hile arguably the act-of-state doctrine could be applied here, caution and fundamental fairness counsel against the use of this judicially fashioned remedy." *Id.* at 140. The court held that the policies underlying the doctrine were not implicated in this case and that "for reasons of fair play and fundamental justice," Protexa should not be permitted to utilize the doctrine "as a sword rather than a shield" to bar the insurance companies from asserting a defense that the order was invalid.[8] Finally, the court determined that the Port Captain's order was invalid under Mexican law and therefore could not constitute legal compulsion under the policy. The court therefore entered judgment for the insurance companies on May 14, 1993.

Protexa again appeals. We have jurisdiction under 28 U.S.C. § 1291, and we apply a plenary standard of review to the district court's interpretation of the insurance policy and its application of controlling legal principles, as the facts germane to the resolution of this matter are not in dispute. *See New Castle County v. Hartford Accident and Indem. Co.*, 933 F.2d 1162, 1183 (3d Cir.1991).[9] "However, 'in reviewing factual findings made by a district court, we apply the clearly erroneous standard set out in Fed.R.Civ.P. 52(a).' " *Id.* (quoting *Goodman v. Lukens Steel Co.*, 777 F.2d 113,

8. *Id.* 954 F.2d at 141. Resting its decision with respect to the act of state doctrine on these points, the court did not reach the insurance companies' argument that the act of state doctrine should not apply because the order directed activity outside of Mexican territory.

9. Neither party suggests that we must be concerned with the somewhat elusive distinction between construction and interpretation on this appeal, *see Ram Constr. Co. v. American States Ins. Co.*, 749 F.2d 1049, 1052-53 (3d Cir.1984), and, as we are affirming the judgment, Protexa, as the appellant, cannot be prejudiced by our exercise of plenary review.

128 (3d Cir.1985), *aff'd*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987)). We will affirm the judgment of the district court.

III. COMPULSORY BY LAW

We first address Protexa's argument that the district court erred in basing its decision on the remand on the finding that the order was invalid. According to Protexa, the case law construing the phrase "compulsory by law" provides that legal compulsion may be found through a "rule of reason" analysis, in which the technical invalidity of the removal order does not necessarily dispose of the coverage issue. Protexa states that the appropriate inquiry under this broader interpretation is whether a reasonable insured shipowner in circumstances such as those in this case would conclude that "removal was reasonably required by law, or . . . failure to remove would have reasonably exposed [the] insured to liability imposed by law sufficiently great to justify the expense of removal." Protexa Br. at 12 (quoting *Progress Marine, Inc.*, 642 F.2d at 820). Consequently, Protexa argues that even if the removal order was "technically invalid," Protexa still reasonably was required by law to remove the wreck because it believed it had to comply with the order. Therefore, it is entitled to recover under the policy. This argument makes liability dependent on Protexa's subjective state of mind.

The insurance companies respond that our prior opinion determined the law of the case, namely, that "removal of the HUICHOL was 'compulsory by law' if removal was directed by a valid order of the Port Captain." *Protexa Appeal I*, 954 F.2d at 141. They therefore contend that Protexa's argument is barred because Protexa is arguing, based solely on the invalid removal order, that removal was nevertheless compulsory by law because Protexa reasonably believed it had to obey the order. The insurance

companies then state that under the case law Protexa must either show that the removal order was valid, or else meet the balancing test and show that the likelihood and severity of sanctions justified the cost of removal. AAMS Br. at 11. While it might appear that the insurance companies' balancing test is not significantly different from the test advanced by Protexa, in fact it is more demanding, as it is objectively based.

Of course, the district court rejected Protexa's claim under the objective balancing test at the first trial when it held that the potential sanctions for noncompliance with the order and potential liability to third parties were much less than the cost of removal of the wreck. We did not disturb these findings in *Protexa Appeal I,* and the district court adopted these findings at the second trial. Thus, if the objective balancing test is adopted, Protexa can prevail only if it can successfully challenge those findings, or if the removal was compulsory by law because the order was valid, or if the insurance companies are barred by the act of state doctrine from challenging the validity of the order.

Even assuming Protexa is not foreclosed by the law of the case from advancing its argument that the removal was compulsory by law on the ground that it reasonably complied with the removal order, we do not read the case law to support the application of a "rule of reason" analysis of the subjective sort Protexa advances. It appears that Protexa has misconstrued the meaning and application of certain language in *Progress Marine* to call for an improper examination into its corporate state of mind.

Protexa is correct in stating that this court and the Court of Appeals for the Fifth Circuit have adopted a test for determining whether removal is "compulsory by law" that encompasses cases beyond the *per se* rule of a valid governmental order. However, in

quoting *Progress Marine* to support its argument that it believed "removal was reasonably required by law," Protexa has taken this phrase out of its original context and given it a much broader, unintended meaning. Rather, as we discuss below, the phrase refers specifically to a situation in which there are particular statutes and/or regulations which direct the insured to remove a wreck even though a removal order has not been issued. Alternatively, the phrase refers to a situation in which the costs which would flow from not removing the wreck would justify the expenditure to remove it.

In *Progress Marine*, the Court of Appeals for the Fifth Circuit adopted an interpretation of the phrase "compulsory by law" going beyond the restrictive interpretation of the Court of Appeals for the Second Circuit that a removal was compulsory by law if directed by a governmental order. *See Seaboard Shipping Corp.*, 461 F.2d at 504. As we explained in *Protexa Appeal I*, in *Progress Marine* a barge sank about 11 miles off of the Louisiana coast, the hurricane season was approaching, and the submerged barge posed a threat both to navigation and to neighboring oil production facilities and workers. But there was no governmental order requiring removal. *Protexa Appeal I*, 954 F.2d at 136. In holding that compulsory by law is not restricted to situations in which a direct government order has been issued, the *Progress Marine* court expanded the term to encompass situations in which "*removal was reasonably required by law*, or where failure to remove would have reasonably exposed an insured to liability imposed by law sufficiently great to justify the expense of removal," 642 F.2d at 820 (emphasis added). By a situation in which "removal was reasonably required by law," the court referred to statutory or regulatory sources of law which arguably required removal. As a demonstration of this understanding, the *Progress Marine* court went on to discuss the various statutes and possible tort actions that the barge owner

reasonably could have believed either compelled him to remove the barge or subjected him to potential tort liability for "enormous damages." 642 F.2d at 820-21.

Furthermore, we already have stated explicitly that the phrase "reasonably required by law" in *Progress Marine* refers specifically to statutory or regulatory duties. In *East Coast Tender Serv.* we recounted the *Progress Marine* holding by quoting the phrase "reasonably required by law" and inserting bracketed language stating: "[*i.e.*, a legal duty imposed by statute]." *East Coast Tender Serv.*, 759 F.2d at 286.[10] Applying this analysis, we addressed the argument that the charterer of barges sunk in the Delaware River was compelled to remove them by New Jersey trespass and nuisance statutes requiring removal of sunken barges from state riparian lands. *Id.* 759 F.2d at 285-87.

Finally, in *Continental Oil* the Court of Appeals for the Fifth Circuit held that "[r]emoval of a wreck is not compulsory by law unless there is a clear legal obligation to remove, *imposed by statute or by judicial decision*, on the party who effects removal." *Continental Oil*, 706 F.2d at 1377 (emphasis added). Because the insured had not demonstrated that there was such an obligation or that governmental authorities had ordered removal of the wreck,

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10. The full quote stated:

> The court concluded that removal is 'compulsory by law' when it is 'reasonably required by law, [*i.e.*, a legal duty imposed by statute], or where failure to remove . . . reasonably expose[s] an insured to liability imposed by law sufficiently great to justify the expense of removal. . . .' *Id.*

East Coast Tender Serv., 759 F.2d at 286.

the court held that removal was not covered by the insurance policy in question. *Id.* In making its analysis, the court again looked to possible statutory and judicial bases for imposing both criminal and civil liability upon the insured.

Thus, we believe that Protexa mistakenly has construed the language of the case law too broadly to embrace a "rule of reason" analysis of the subjective sort it describes. Rather, contrary to Protexa's position, the language it quotes from *Progress Marine* refers to the second two elements of the test for determining whether removal was subject to legal compulsion which we recognized in *Protexa Appeal I, i.e.,* removal required by statute or regulation or by the objective balancing test involving a comparison of the costs of removing and not removing the wreck.[11] Of course, in this case there is no self-executing statute or regulation requiring removal and the district court in unassailable

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11. In *Protexa Appeal I,* after reviewing the *Seaboard Shipping Corp., Progress Marine, Continental Oil,* and *East Coast Tender* decisions, we stated:

> In sum, we interpret all of the decision described above to mean that removal is 'compulsory by law' if it is directed by government order. Our decision in *East Coast Tender Serv.,* and the two earlier Fifth Circuit decisions interpret this phrase to encompass *additional* cases, *viz.,* those in which removal is required by statute or regulation, and those in which a reasonable shipowner at the relevant time would determine that the probable cost of removal would be less than the probable tort liability if removal was not undertaken. Accordingly, if the Port Captain's order in this case was a valid removal order, Protexa was entitled to recover under the policy provision in question.

Protexa Appeal I, 954 F.2d at 138 (emphasis original).

findings rejected Protexa's claim under the objective balancing test. Thus, Protexa can establish that the removal was compulsory by law only if it can establish that the Port Captain's order was valid.

Because we have determined that the district court was not compelled by precedent to engage in a "rule of reason" analysis of the sort advocated by Protexa, we do not need to determine whether Protexa could recover if that test were applicable. However, we note that Protexa's argument that an *apparently* legal order may alone create legal compulsion seems problematic for several reasons. First, our opinions in *East Coast Tender* and *Protexa Appeal I* do not make any reference to giving weight to the facial validity of a removal order. Second, in *Continental Oil* the Court of Appeals for the Fifth Circuit specifically eliminated what was originally a subjective component to the *Progress Marine test,*[12] and it appears to us that Protexa's argument would revive such an inquiry. Third, even if a subjective "rule of reason" analysis were appropriate, the factual findings of the district court demonstrate that Protexa did not take the steps necessary to arrive at a reasonable conclusion as to the validity of the removal order once it had been issued.[13] The situation the district court described

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12. The subjective element of the *Progress Marine* test had inquired "whether removal was performed as a result of a subjective belief on the part of the insured that such was reasonably necessary . . . ." *Continental Oil Co.*, 706 F.2d at 1371 (quoting *Progress Marine*, 642 F.2d at 820).

13. We need merely accept the district court's factual findings to arrive at this understanding. The district court was very critical of the actions of the Protexa attorney who reviewed the order, determined its validity, and recommended that it should not be challenged:

> Uriarte's review of the Order and the applicable statutes

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in its findings on this point can be contrasted to the procedures

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> contained in the Order occurred within the span of 45 minutes. He then concluded the Order was valid and he and other Protexa representatives announced to those assembled that the wreck would be removed. Uriarte had no training in admiralty law and was unfamiliar with the United Nations Convention of the Law of the Sea. He also failed to engage in an effort to seek the counsel of someone who in fact did possess maritime legal experience. At this point in time Protexa anticipated spending a minimum of $3,785,800 to a maximum of $5,390,592 for wreck removal and relief upon nothing more than an oral opinion from a staff attorney. For Protexa to proceed in this fashion is not only extraordinary but incredible and casts serious doubt on the exercise of its corporate judgment.

Protexa I, 753 F.Supp. at 1233. Moreover:

> Uriarte's visit to the Port Captain's office was a *pro forma* appearance but of little substance. He was so ill-prepared and uninformed that his application was doomed to failure even before it was presented. For example, he was unaware of whether the Mexican government had any means at its disposal to remove the HUICHOL. He did not know what a third-party salvor would charge to remove a wreck. No one at Protexa had told him what it was going to cost Protexa to remove the wreck. He was unaware that three miles separated the HUICHOL from a Pemex platform or related structure. In terms of sanctions, he admitted that forfeiture of the HUICHOL to the government was not a sanction that required the Order to be obeyed. Protexa further stipulated that the threat of fines was not the primary motivating factor for the removal of the wreck. Without

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normally followed in a wreck removal situation, as described in the expert testimony at the first bench trial. *See Protexa I*, 753 F.Supp. at 1233-36.

Even though we do not accept Protexa's argument that an apparently valid order can created legal compulsion, we recognize that Protexa has raised a significant point, *viz.*, that the actions of a party faced with such an order should not be evaluated *ex post* according to a standard stricter than that applied under the objective balancing test to an insured's actions in removing a wreck when no order has been issued. We do not understand case law as having foreclosed the possibility that an apparently valid removal order, ultimately determined to be invalid, can be factored into the objective test of balancing probable liability versus removal costs to determine legal compulsion. While discussions of probable liability in the cases we have cited focused on tort liability, none of the courts dealt with a case in which there had been a removal order.

Thus, although we now do not decide the issue conclusively, it would seem reasonable to factor the probable sanctions for disobeying an ostensibly valid removal order into the balancing test for determining whether removal is compulsory by law, and

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> further belaboring this opinion with Uriarte's cross-examination, it is important to note that he did not make a technical presentation to the Port Captain pertaining to the wreck constituting a hazard to navigation. The commercial and moral implications that AAMA asserts motivated Protexa to remove the wreck are documented in Uriarte's cross-examination.

Id. 753 F.Supp. at 1234 (citations to trial transcript omitted).

this opinion should not be taken as foreclosing that possibility. Hence, removal could be considered "compulsory by law" even in the face of a government order later determined to be invalid, so long as on an objective analysis the reasonable costs of disobeying the order and the probable tort liability outweighs the removal expenses.

Nevertheless if we apply this standard and factor the existence of the removal order into the objective balancing equation, we still would not consider that the removal of the HUICHOL was "compulsory by law." We predicate this conclusion on the finding of the district court in *Protexa I* that even assuming the removal order was valid, Protexa did not satisfy the balancing test the court applied.[14] We reiterate that although we reversed the district court's original judgment on the ground that it applied an improper standard, we now accept its findings of fact that supported its

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14. The district court stated:

> The sanctions [envisioned by Protexa in making its decision] were in fact meaningless and lacked persuasive value. Removal of the HUICHOL by the Mexican government or through a third-party salvor in light of the [very high] Protexa-estimated cost of removal was no sanction. The potential for catastrophic liability to third-parties if the wreck were to move within the oil field was remote, particularly in view of the three mile distance between the wreck and any Pemex installation . . . . The sanctions of fines and the risk of loss of the bond amounted to approximately $50,000. They could not in this factual scenario, either individually or cumulatively, amount to a sanction.

Protexa I, 753 F.Supp. at 1236.

determination, as the district court's opinion on the remand readopted these fully justified findings. *Protexa II* at 5.

In reaching our result that the removal was not compulsory by law under the objective balancing test, we have not lost sight of the fact that the sinking of the HUICHOL was a tragic event. We well understand why Protexa believed it should raise the wreck. However, we must stress that the issue before us is whether or not Protexa is entitled to recover the costs of removing the wreck under its insurance policy. Although Protexa clearly was under tremendous moral and commercial pressure to raise the wreck, *see Protexa I*, 753 F.Supp. at 1228, these factors do not tend to establish that removal was compulsory by law under the terms of the insurance policy. Accordingly, inasmuch as we reject Protexa's case insofar as based on the objective balancing test, Protexa can only recover if the order is unassailable under the act of state doctrine or if it was in fact valid. Thus, we now turn to Protexa's argument that the act of state doctrine prohibits judicial inquiry into the validity of the order.

IV. ACT OF STATE

As we have indicated, in *Protexa Appeal I* we did not determine whether the act of state doctrine barred the insurance companies from challenging the validity of the removal order. On the remand, the district court addressed the issue and held that "[w]hile arguable the act-of-state doctrine could be applied here, caution and fundamental fairness counsel against the use of this judicially fashioned remedy." *Protexa II* at 40.

In its analysis, the court first stated that the policies underlying the doctrine — "international comity, respect for sovereign nations on their own territory and deference to the

executive branch in the administration of foreign policy" — were not implicated inasmuch as this case involves an insurance dispute between private parties of no interest to the governments of Mexico or the United States or to the international community.[15] Second, the district court found the doctine inapplicable, because Protexa was attempting to use it "as a sword rather than a shield." *Id.* at 41. The court interpreted the case law as teaching that for reasons of fair play and fundamental justice, a court is reluctant to invoke the doctrine on behalf of a party seeking relief. In this regard it noted that Protexa chose to bring the action in federal district court in New Jersey, and thereby deprived a Mexican court of the opportunity to adjudicate the validity of what to that court would have been a domestic order, the review of which could not have implicated the act of state doctrine. Thereafter Protexa defended its selection of an American forum by resisting the insurance companies' motion to dismiss predicated on *forum non conveniens*. The district court held that in these circumstances "it would be unjust to permit Protexa the benefit of an American forum and the protection of a doctrine that would unfairly impede the defendants in their ability to assert a defense." *Id.* in view of these conclusions the court did not reach a contention advanced by the insurance companies that the doctrine by its terms could not be applicable, as the order of remand directed conduct to be taken outside of Mexican territory.

On this appeal Protexa again argues that the act of state doctrine applies, so that the Port Captain's order must be

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15. The court stated that the decision of the Port Captain on a purely local matter eventually will determine who will pay for the wreck removal, and that in examining the validity of this decision the court "is not creating principles of domestic and international law, but is applying them as they have been promulgated by their respective entities." *Id.* at 41.

considered a valid act of the Mexican government. Protexa contends that this case involves more than a mere insurance coverage dispute for several reasons. First, it claims that the district court ruled as a matter of law that the Mexican government does not possess the legal right to order a Mexican corporation to raise its own wreck from offshore oil fields under Mexico's jurisdiction. Second, Protexa claims that an issue of Mexican policy is at stake, namely, that nation's powers within the 200-mile Exclusive Economic Zone (EEZ). The EEZ is a maritime boundary established under UNCLOS, and comprises an area beyond and adjacent to the territorial sea, subject to the specific legal regime set forth in UNCLOS.

Protexa also correctly notes that the sinking immediately caught the government's attention, leading to the removal order. Protexa further reasons that Mexico has not demonstrated more recent interest in the implementation of the Port Captain's order because Protexa complied with it. Consequently, Protexa asserts that the decision of the district court represents "a breathtaking intrusion into matters of Mexican sovereignty and jurisdiction in its EEZ and over its own citizens" and that it was clear error for the court not to apply the doctrine. Protexa Br. at 21.

Protexa also argues that the trial court invented a fairness exception to the doctrine "without precedent in any controlling case law" and "clearly contrary to the mandate of the act of state doctrine." *Id.* at 21. Rather, Protexa claims, the history of the doctrine shows that the judicially-created act of state doctrine puts the interests of amicable and orderly relations between nations before considerations of fairness to private litigants. Thus, Protexa asserts that the doctrine would be ineffective if it could be circumvented simply because its implementation would be unfair to the party prevented from challenging the act of the foreign state.

Finally, Protexa responds that its choice of an American forum was entirely appropriate. It points out that the insurance companies are United States corporations with no assets or presence in Mexico, the insurance policy was issued by an agent in the United States for a premium in United States dollars, and the final adjustment was undertaken by a United States firm and determined in dollars. Furthermore, Protexa observes that even if it obtained jurisdiction over the insurance companies in Mexico, it still would have to execute any judgment it obtained in the United States. Protexa Br. at 23-24.

We therefore turn to an analysis of the act of state doctrine and its applicability in this case. As we have stated:

> Under the [act of state] doctrine, the courts of this country will refrain from judging the validity of a foreign state's governmental acts in regard to matters within that country's borders.

Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1057-58 (3d Cir. 1988) (citations omitted) (*Environmental Tectonics Circuit Op.*), *aff'd, W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990) (*Environmental Tectonics S.Ct. Op.*). "The act of state doctrine is not some vague doctrine of abstention but a 'principle of decision binding on federal and state courts alike.' " *Environmental Tectonics S.Ct. Op.*, 493 U.S. at 406, 110 S.Ct. at 705 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427, 84 S.Ct. 923, 940, 11 L.Ed.2d 804 (1964)). "Act of state issues only arise when a court must decide — that is, when the outcome of the case turns upon — the effect of official action by a foreign sovereign.' *Environmental Tectonics S.Ct. Op.*, 493 U.S. at 406, 110 S.Ct. at 705.

Appendix B

Regardingthe foundation of the doctrine, the Supreme Court has explained:

> This Court's description of the jurisprudential foundation for the act of state doctrine has undergone some evolution over the years. we once viewed the doctrine as an expression of international law, resting upon 'the highest considerations of internation comity and expedience,' *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-304, 38 S.Ct. 309, 311, 62 L.Ed. 726 (1918). We have more recently descibed it, however, as a consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S.Ct. 923, 937, 11 L.Ed.2d 804 (1964).

Environmental Tectonics S.Ct. Op., 493 U.S. at 404, 110 S.Ct. at 704. "Therefore, the application of the doctrine depends on the likely impact on international relations that would result from judicial consideration of the foreign sovereign's act." *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 520-21 (2d Cir.), *cert. dismissed*, 473 U.S. 934, 106 S.Ct. 30, 87 L.Ed.2d 706 (1985). "For this reason, the Supreme Court has not laid down rigid rules to govern the doctrine's application, but leaves it to the lower courts to determine whether a conflict between the judicial and political branches exists in a particular case." *Environmental Tectonics Circuit Op.*, 847 F.2d at 1058. "If adjudication would embarrass or hinder the executive in the realm of foreign relations, the court should refrain from inquiring into the validity of the

foreign state's act." *Allied Bank Int'l*, 757 F.2d at 521 (citing *Sabbatino*, 376 U.S. at 427-28, 431-33, 84 S.Ct. at 939-40, 941-43; *Garcia v. Chase Manhattan Bank*, 735 F.2d 645, 651 (2d Cir. 1984)).

We acknowledge that, as the district court recognized, the act of state doctrine arguably is applicable in this case. However, "sometimes, even though the validity of the act of a foreign sovereign within its own territory is called into question, the policies underlying the act of state doctrine may not justify its application." *Environmental Tectonics S.Ct. Op.*, 493 U.S. at 409, 110 S.Ct. at 706. Assuming for purposes of this discussion that the insurance companies' extra-territorial argument is erroneous, we believe that this is such a case, in that the rationale supporting application of the doctrine is not present here. Therefore, we hold that the act of state doctrine does not bar inquiry into the validity of the Port Captain's order.

As we have stated, the party invoking the act of state doctrine has the burden to prove its applicability. *Environmental Tectonics Circuit Op.*, 847 F.2d at 1058 ("The party moving for the doctrine's application has the burden of proving that dismissal is an appropriate response to the circumstances presented in the case."); *see also Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694, 96 S.Ct. 1854, 1861, 48 L.Ed.2d 301 (1976); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713 (9th Cir.1992), *cert. denied*, __ U.S. __, 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993); *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 303 n. 4 (3d Cir.1982). "At a minimum, this burden requires that a party offer some evidence that the [foreign] government acted in its sovereign capacity and some indication of the depth and nature of the government's interest." *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir.1989), *cert. dismissed*, 497 U.S. 1058, 111 S.Ct. 27, 111 L.Ed.2d 840 (1990), *quoted in Siderman*, 965 F.2d at

713. Furthermore, cognizant of the rationale supporting the doctrine, a court also must analyze on a case-by-case fashion "the extent to which in the context of a particular dispute separation of powers concerns are implicated." *Allied Bank Int'l*, 757 F.2d at 521. In other words, the court must determine whether there is evidence of a potential institutional conflict between the judicial and political branches such that a judicial inquiry into the validity of a foreign state's actions could embarrass the political branches in their conduct of foreign affairs. *See Environmental Tectonics Circuit Op.*, 847 F.2d at 1058. This analysis "must always be tempered by common sense." *Allied Bank Int'l*, 757 F.2d at 521 (citations omitted). " 'The less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.' " *Id.* (quoting *Sabbatino*, 376 U.S. at 428, 84 S.Ct. at 940).

The insurance companies maintain that Protexa has not met its burden to demonstrate that the act of state doctrine applies here. They contend that Protexa has not proven that the Port Captain's order even constitutes a Mexican act of state, nor that any government potentially involved in the incident is concerned about having the validity of the order adjudicated in the federal courts.[16] The insurance companies point out that the Mexican government, through its Merchant Marine ("Marine Mercante"), is well aware of this litigation for it permitted the Port Captain to come to the United States to testify in the case. Thus, the companies argue that the Mexican government is not concerned with having the validity of the order adjudicated here. Protexa contends, however, that the Port Captain's order implicated Mexican national interests concerning the safety of its citizens and its oil exploration in the

16. In addition to Mexico and the United States, Panama might have taken an interest in the case, as the HUICHOL was registered there.

EEZ. As evidence that the incident attracted the attention of the Mexican government, Protexa submits in its reply brief a written opinion of the Port Captain's superiors, the Marine Mercante, affirming the authority of the Port Captain to issue the order.[17]

Although the depth and nature of Mexico's interest in this matter are debatable, we will assume without deciding that it has a substantial interest in this case.[18] Nevertheless, Protexa has not demonstrated — nor do we find — that this controversy implicates separation of powers concerns of the sort necessary to support invocation of the doctrine. This litigation is between private parties for the sole purpose of resolving an insurance coverage dispute which, in turn, depends upon the construction and application of a single phrase in the policy. We see no reason for believing that a judicial inquiry into the validity of the Port Captain's order under Mexican law, in order to determine whether Protexa may recover wreck removal costs, would hinder the conduct of foreign relations by the United States government. In any event, Protexa has not offered evidence suggesting that our rejection of the act of state doctrine would have that consequence, nor even a basis for believing that diplomatic difficulties could arise in the aftermath of this case.[19]

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17. Prior to oral argument, we denied the insurance companies' motion to strike material concerning the opinion of the Marine Mercante from Protexa's reply brief and supplemental appendix.

18. Thus, we also decline to address whether the issuance of a removal order by the Mexican Port Captain "can be, in certain circumstances, a sufficiently formal expression of a government's public interests to trigger application of the doctrine." *Environmental Tectonics Circuit Op.*, 847 F.2d at 1058. *See Remington Rand Corp. v. Business Systems, Inc.*, 830 F.2d 1260, 1265 (3d Cir. 1987); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294 (3d Cir. 1979).

19. Protexa at most asserts that a consequence of holding the Port Captain's

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We also point out that Protexa's contention that an issue of Mexican policy is at stake as we are making a determination of the scope of its powers within the EEZ is simply wrong. As will become clear from the section of our opinion dealing with the validity of the order, we are placing no limitations on the scope of Mexican authority in the EEZ. Rather, we only are determining that the Mexican Congress itself did not establish a legal predicate for the order. Thus, instead of attempting to circumvent Mexican law, we honor that law and apply it.

Essentially, Protexa's invocation of the act of state doctrine would require this court to engage in mere conjecture about the effect that inquiry into the validity of the order might have on relations between the United States and Mexico. However, we stated in *Environmental Tectonics* that invocation of the doctrine requires proof of "a demonstrable, not a speculative, threat to the conduct of foreign relations by the political branches of the United States government." 847 F.2d at 1061. Because we believe that no such threat has been demonstrated, and we will not engage in

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order invalid would be that future recipients of similar removal orders would challenge them, thereby exciting Mexico's interest. Yet such a possibility still does not imply that the conduct of foreign relations by the United States government would be hindered as a result.

Moreover, additional challenges to removal orders would seem to raise no such threat, since it is perhaps exactly what should have happened in the present case and should so occur in the future. It appears that Protexa could have challenged the order under the Mexican law of "amparo," the judicial proceeding by which Mexican citizens seek relief from governmental orders. In fact, Protexa's main legal expert witness at trial was Dr. Ignacio Melo, a noted lawyer and expert in Mexican maritime and amparo law who has been drafting amparos for 37 years and has handled 25-30 wreck removal order cases with 10-15 in the last six years. Protexa Br. at 27-29. Such qualifications alone indicate that challenging such orders is not unusual.

speculation on this question, we hold that the act of state doctrine is inapplicable here. Hence, we have no need to reach the insurance companies' argument that the issuance of the order was an extra-territorial exercise of jurisdiction, and thereby outside of the doctrine's scope.[20]

Furthermore, we believe that the district court was correct when it pointed out that application of the act of state doctrine in this case differs materially from the manner in which it typically is interposed, *viz.*, by defendants as a "shield." Were we to apply the doctrine to bar judicial inquiry into the validity of the removal order, Protexa automatically would obtain coverage under the insurance policy. Thus, the doctrine would be utilized as a "sword" to prevent the insurance companies from challenging the coverage.

There is another factor which works against applying the act of state doctrine. As we have explained above, Protexa chose to bring this action in the United States. While it contends that it had perfectly legitimate reasons for doing so, and we have no reason to question its good faith, the fact is inescapable that it is seeking to obtain an outcome determinative advantage from its forum selection. We reach this conclusion for, as our analysis in the next section demonstrates, the Port Captain's order was invalid under Mexican law. Yet Protexa seeks through its forum selection to activate the act of state doctrine and preclude inquiry into the validity of that order. If we apply the act of state doctrine, we will encourage plaintiffs seeking to establish rights under invalid

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20. To decide this question would seem to decide the very validity of the Port Captain's order since the Port Captain's authority and jurisdiction are relevant to the order's validity. As such we do not feel it necessary or wise to consider the implications of a situation in which a court in order to determine whether the act of state doctrine should be invoked, necessarily must perform the inquiry that the doctrine would prevent.

foreign orders and governmental actions to come to this country to bring their cases.

We need not create a "fairness exception" to the doctrine, nor focus solely on the insurance companies, however, to recognize that in the circumstances of this case application of the doctrine would disturb the legal regime underlying the insurance contract. After all, the parties contracted for coverage only if the removal was compulsory by law, meaning in response to a valid order.[21] Indeed, Protexa acknowledges that prior to the issuance of the policy involved in this case it "had always purchased broad form wreck removal coverage" which provided coverage "whenever removal is deemed necessary by the insured." Protexa brief at 5. It further acknowledges that it sought that coverage in the policy involved in this case but could not obtain it, as the insurance companies offered the narrower "compulsory by law" coverage on a "take or leave it" basis. Thus, in this case Protexa was well aware of the limitations of its coverage, and if we permit it to invoke the act of state doctrine to preclude an inquiry into the validity of the order, we will be expanding its coverage beyond what it purchased and paid for.

As we noted in *Protexa Appeal I*, it is significant that Protexa and the insurance companies knew of the case law construing the words "compulsory by law." Therefore, they were presumed to have intended these words to have their proper legal meaning and effect. 954 F.2d at 135-36. Thus, the parties to the insurance policy bargained for the possibility that a court might inquire into the validity of a governmental removal order to determine whether a policy covered a particular wreck removal.

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21. Of course, the removal also could be compulsory by law under either of the other two factors we recognized in *Protexa Appeal I*, but we are not concerned with them in this aspect of our opinion.

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V. VALIDITY OF THE ORDER

In *Protexa Appeal I* we held that the removal of the wreck was "compulsory by law" if directed by a valid order of the Port Captain. 954 F.2d at 141. Inasmuch as we have determined that the act of state doctrine does not apply and the removal was not compulsory by law under the objective balancing test, we must decide whether the removal order was valid. In this section of our opinion we cite to various provisions of Mexican and international law which we have reprinted in English in the appendix to this opinion.[22]

Under Fed.R.Civ.P. 44.1, the determination of foreign law in the federal courts is a question of law to be resolved by reference to any relevant information, including that provided by expert witnesses. *Merck & Co.*, 774 F.2d at 488. Consequently, we exercise plenary review on this question, and are not confined to information available to or considered by the district court.[23]

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22. We have copies of Mexican documents translated into English in somewhat different versions. We are satisfied, however, that the differences in the translations are not material to the issues here. Insofar as they are available, we have used the versions used by the district court in *Protexa II*.

23. *See Mobile Marine Sales, Ltd v. M/V Prodromas*, 776 F.2d 85, 89 (3d Cir. 1985). The insurance companies urge us, however, to give at least some deference to the district court's determination of foreign law, on the grounds that this case fits a scenario in which scholarly commentary has noted that deference is justified:

> A more restrictive review of foreign-law determinations than is usually accorded domestic law seems justifiable only when the oral testimony on alien law offered at trial is in conflict and the circumstances justify according

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We will begin, therefore, by reviewing certain facts relevant to determining the validity of the removal order. Prior to the HUICHOL's sinking in bad weather, it had been granted permission by the Port Captain of the Port of Carmen to anchor in an otherwise prohibited area within the Pemex oil exploratory zone. Anchorage is prohibited in this area because oil platforms and submerged oil pipelines are located in it. The HUICHOL sank

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> special weight to the district judge's ability to evaluate credibility and demeanor.

Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 Mich. L.Rev. 613, 689-90 (citing *Remington Rand, Inc. v. Society Internationale*, 188 F.2d 1011 (D.C.Cir.), *cert. denied*, 342 U.S. 832, 72 S.Ct. 44, 96 L.Ed. 630 (1951)). Although the district court was presented with conflicting expert testimony and did have the opportunity to evaluate credibility and demeanor, we believe that the insurance companies have not demonstrated sufficiently that deference is appropriate here. First, a footnote to the quotation above indicates:

> The value of demeanor evaluation in the case of expert testimony on foreign law should not be overemphasized, however. It seems unlikely that the physical appearance and emotional state of a foreign-law expert will be sufficiently distinctive to provide insights into his competence that are not available from the record of his testimony.

Id. at 690 n. 295. Second, the insurance companies point to no special circumstances — other than the conflicting testimony — that would warrant a deferential approach, and they have cited no precedent in support of their position. Because we are convinced that the record is sufficient to enable us to evaluate the competing testimony in an informed manner, we choose not to depart from our normal standard of plenary review.

approximately 45 miles from the Port of Carmen[24] — beyond the 12-mile limit which denotes Mexico's territorial sea. *Protexa II* at 14-15. Its wreck lay in waters that under UNCLOS comprise the Exclusive Economic Zone, an area of international waters, beyond and adjacent to the territorial sea, in which the coastal state — here Mexico — may exercise sovereign rights to explore, exploit, conserve and manage the natural resources.[25]

A port captain has limited jurisdiction over the EEZ and may perform police functions within this jurisdiction pertaining to health, sanitation and customs. *Id.* at 15, 49. But the Port Captain acknowledged in his testimony that there is a difference between the geographic supervision and the subject matter jurisdiction of his office. Although his jurisdiction exists by virtue of presidential decree, his authority and control within the EEZ are defined by law. *Id.* at 17. The Port Captain testified that he issued the removal order for several reasons, the principal one being that the wreck was located in a high safety zone from which, in his view, all wrecks must be removed. Moreover, he believed removal was required because the Mexican Attorney General had commenced his investigation, and a visual and physical inspection of the ship would facilitate this process. The Port Captain also believed that the location of the wreck was in an area that affected the Port of Carmen. Finally, due to the loss of life, there was tremendous pressure to recover the bodies of the crew immediately, and the Port Captain believed it important politically to commence removal without delay. *Id.* at 15-16.

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24. The Port of Carmen supports offshore oil exploration and exploitation. *Protexa II* at 39.

25. We have included relevant UNCLOS provisions in the appendix.

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Although the Port Captain testified as to his concern for safety and his opinion that the HUICHOL constituted an obstacle to maintenance activity in the oil field, he issued the order without procuring a technical analysis regarding potential movement of the wreck, its threat to oil pipelines and structures, and its potential environmental impact. *Id.* at 16. The district court also noted that even though oil companies normally prepare and maintain charts indicating the location of oil pipelines, there was no testimony that the Port Captain had sought access to such charts. *Id.* at 16 n. 6. Furthermore, Pemex did not exert any pressure for wreck removal; rather, the Port Captain attempted to pressure Pemex to enlist its cooperation. *Id.* at 16. Finally, the wreck lay more than 500 meters from any oil platform, and Protexa never told the captain before he issued the order that the wreck was rapidly sinking in the mud. *Id.* at 16-17.

The district court considered the validity of the order under Mexican statutory and constitutional law, for it believed that a due process inquiry under the Mexican Constitution was relevant to its final validity determination.[26] Ultimately, the district court held

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26. Article 16 of the Mexican Constitution provides that "no one may be bothered in his person, family, domicile, papers or possessions, except by means of written order issued by a competent authority providing the basis and the reasons of the legal cause for the proceedings." Regarding the due process inquiry the district court stated:

> Overarching the validity of the Port Captain's order is whether the Port Captain, as a representative of the Mexican government, possesses the authority to order a private citizen to raise and remove a wreck beyond Mexico's territorial sea without specific statutory authority enabling him to do so. Because Protexa was a

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that the Port Captain's order required Protexa to raise a wreck outside Mexico's territorial waters was invalid because: (1) it was not authorized by Mexican statutory law; and (2) under Article 16 of the Mexican Constitution, the government cannot order a private party to raise a wreck at is own expense absent statutory authority. Finally, even though the removal order did not cite to principles of the international law of the sea for authority, and the district court believed that UNCLOS was not incorporated into Mexican law prior to the issuance of the order, the court nevertheless examined the relevant provisions of UNCLOS and found them to provide an insufficient basis for the order.

In reaching its conclusions, the district court considered testimony regarding the validity of the order under Mexican and international law from witnesses produced by both sides, and we

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> private citizen when its vessel, the Huichol II (Huichol), sank and the sinking occurred outside of Mexico's territorial waters, this inquiry is especially appropriate. Given that the Republic of Mexico models its Constitution after that of the United States, the due process inquiry is as relevant under the Mexican Constitution as it would be under the United States Constitution.
>
> The answer to the inquiry centers on the interplay between Mexico's exercise of its sovereign power in relation to that of its citizens. If the sovereign's exercise of power is unbridled or authorized by law, then the Port Captain's order is valid. If the Port Captain's order is in fact unauthorized by law or is proscribed in the constitutional sense, then the order is invalid.

Protexa II at 5-6 (footnote omitted).

consider such testimony integral to our present decision.[27] We therefore examine the statutes cited by the Port Captain in the order as authority for requiring Protexa to raise the wreck: Article 86 of the Law of Navigation and Maritime Commerce (Navigation Law), and Articles 262 and 268 of the Law of General Means of Communication (Means of Communication Law). Because the expert witnesses differed over the meaning of these statutes, the district court made reference to other portions of the statutes and we will consider them as well.

A. *Article 86 of the Navigation Law*

The Port Captain first cited Article 86 of the Navigation Law, enacted in 1963. The article is a wreck removal provision which states in part:

> If a ship runs aground or sinks in a port, in an area considered as such in terms of the last paragraph of Article 33, or in a general waterway of communication, in a manner that constitutes a navigational obstacle or that affects navigation, it shall be removed within the period set forth by the Navy Department.

Clearly there are two requirements for Article 86 to be applicable.

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27. These witnesses were Miguel Angel Rebolledo, the Port Captain who issued the order; Dr. Ignacio Melo, an expert in Mexican maritime law; Bernard Oxman, an expert in international law and the United Nations Convention on the Law of the Sea ("UNCLOS"); Ambassador Alberto Szekely, an expert in Mexican law of the Sea and UNCLOS; Francisco Alva Rosas, an acting port captain; and David Pockett, an expert in wreck removal and salvage operations. Depositions of Pockett and Robert Umbdenstock, the on-site salvage matter who assisted Protexa with the removal operation, also were read into the record.

First, the ship must sink in a specific location, namely, a port, an area considered to be a port under Article 33 of the Navigation Law, or in a "general waterway of communication." Second, the sunken ship must constitute an obstacle to navigation or affect navigation.

Although Protexa's expert on maritime law, Dr. Ignacio Melo, and the insurance companies' expert on maritime law, Ambassador Alberto Szekely, agreed that the HUICHOL sank outside of Mexico's territorial waters and in the EEZ, they disagreed on whether Article 86 granted the Port Captain the authority to order wreck removal at the expense of a private citizen where the HUICHOL sank. While they agreed that the HIUCHOL did not sink in a port or in an area considered as such under Article 33, they disagreed as to whether the waters of the EEZ were waters of general means of communication.[28] The district court credited Ambassador Szekely's testimony that the EEZ was not a general waterway of communication within the meaning of Article 86. *Protexa II* at 43-45. The Ambassador pointed out that the phrase "general waterway of communication" is defined in Article 1 of the Means of Communication Law. Section I of that article refers to Mexico's territorial waters, and the three remaining sections refer to several types of federal waters capable of sustaining international commerce or commerce among the Mexican states. However, the article does not mention the EEZ.

Protexa's expert, Dr. Melo, testified that the EEZ could be considered a "general waterway of communication" because Article 9 of the Navigation Law, passed in 1963, derogated the definition of "general waterway of communication" contained in Article 1 of the Means of Communication Law, passed in 1940.

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28. Article 33 refers to places not yet declared as ports or still under construction and located within the coastline.

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Article 9 states in part: "The general means of communication by water are the territorial seas and the *other waters of federal jurisdiction,* when they can be used for navigation." (emphasis added). On Dr. Melo's theory, use of the phrase "other waters of federal jurisdiction" in Article 9 was a statutory anticipation of Mexico's creation of the EEZ.

Ambassador Szekely, however, contended that Article 9 of the Navigation Law did not supersede Article 1 of the Means of Communication Law. Rather, he stated, the phrase "other waters of federal jurisdiction" in Article 9 of the Navigation Law was merely a shorthand expression for the waters enumerated in sections II-IV of Article 1 of the Means of Communication Law, as those delineated waters were all waters of federal jurisdiction as distinguished from the territorial waters of the first section. Thus, the entire sentence in Article 9 references all of Article 1. Moreover, Ambassador Szekely showed that Article 1 of the Means of Communication Law could not have been abrogated by Article 9 of the Navigation Law because Article 6 of the Navigation Law expressly mandates reference to the Means of Communication Law when questions arise regarding the interpretation of general ways of communication by water. Finally, the Ambassador also challenged Dr. Melo's view that Article 9 of the Navigation Law anticipated the concept of the EEZ in 1963, as he showed that the physical contours of the EEZ were not formed until 1971 and Mexico established its 200-mile zone in 1976 and ratified UNCLOS in 1982. Thus, in Ambassador Szekely's opinion, the EEZ is not included in the definition of a "general waterway of communication," and under Article 1 of the Means of Communication Law, the outer limit of the general way of communication of water is the 12-mile limit of the territorial sea which is the property of Mexico. Accordingly, Ambassador Szekely reasoned that because the HUICHOL sank in the EEZ, an

area beyond the territorial sea and not the property of Mexico, it did not sink in a "general waterway of communication."

The district court found "Ambassador Szekely's knowledge of the statute's language and his grasp of the legislative history . . . compelling." *Protexa II* at 45. Consistent with the Ambassador's testimony, the district court held that "Article 86 is territorially based, limited to the property of Mexico, bounded by a twelve-mile border and limited to a port or in an area considered as such," and "its application is restricted to an obstacle to navigation or one which affects it." *Id.* Inasmuch as the HUICHOL sank outside of Mexico's territorial waters and did not affect navigation, the district court held that Article 86 of the Navigation Law could not supply a legal basis for the Port Captain's order.[29]

We agree with the district court's conclusion. On appeal, Protexa raises essentially the same arguments it advanced in the district court, contending that the EEZ is included as a "general waterway of communication," even if the concept was not formed fully in 1963, because "the plain wording of the statute conclusively evidences the contemplation by the Mexican legislature of some maritime zone of federal jurisdiction distinct from territorial waters as early as 1963 — and it intended Article 86 to have effect in those waters wherever they may be." Protexa Br. at 32. To bolster this claim, Protexa provides a history of the development of the EEZ concept and its enactment into Mexican law, and expressly points out that the Mexican Federal Law of the Sea, which incorporates UNCLOS into Mexican law and became

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29. The court also noted that the testimony of the acting port captain, Francisco Alva Rosas, was consistent with that of Ambassador Szekely. Rosas, the acting port captain, should not be confused with Rebolledo, the Port Captain who issued the order. *See* footnote 27, *supra.*

effective in 1986, states in its preamble that it "has federal jurisdiction," and it governs the EEZ among other maritime zones.[30]

Yet, it remains the case that in 1963, when Articles 86 and 9 of the Navigation Law were enacted the EEZ concept was at best in a period of gestation, and there were no contemplated waters of federal jurisdiction other than those described in Article 1 of the 1940 Means of Communication Law, which provided the definition of "general waterway of communication," and to which explicit reference is made by Article 6 of the Navigation Law. We therefore reject the argument that although the Navigation Law was enacted against the backdrop of the 1940 Means of Communication Law, nevertheless the use of the phrase "other waters of federal jurisdiction" in Article 9 was intended by the Mexican Congress to provide for an ever-expanding definition of the "general means of communication by water."

For several reasons, the fact that the international community later developed the EEZ concept and Mexico asserted jurisdiction over it as provided under UNCLOS does not alter the reasonable interpretation that under Mexican law the EEZ is not a "general waterway of communication" under Article 86. First, as

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30. Protexa Br. at 32-37. Article 2 of the Federal Law of the Sea states:

> This Law has federal jurisdiction; it governs the maritime zones that are part of the national territory and, as applicable, the maritime zones beyond said territory over which the nation exercises sovereign rights, jurisdiction and other rights.

25 Int'l Legal Materials 889 (1986); Protexa App. at 515.

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Ambassador Szekely testified, Article 6 of the Navigation Law provides that the definition of "general ways of communication by water" is also consistent with the international treaties ratified by Mexico, and Article 9 of the same law implicitly makes all general ways of communication by water Mexican property. Therefore, to extend the concept of "general ways of communication" to include the EEZ would imply Mexican ownership over the EEZ, contrary to international law and to Mexico's treaty obligations, as Mexico does not and could not own the EEZ.

Protexa responds to this interpretation by arguing that the statutes cited in the removal order are not limited to the territory of Mexico, and even if they were, the removal order still would be valid under principles of international law. Protexa Br. at 46-47. Yet, here we are addressing merely the question of whether the EEZ can be included under the definition of "general ways of communication" as argued by Dr. Melo and not the broader question of whether the order is consistent with international law. We believe that the use of the phrase "other waters of federal jurisdiction" in Article 9, as passed in 1963, did not contemplate the later development of the EEZ, and Protexa has provided no grounds for believing that non-territorial "general ways of communication" were so contemplated. Consequently, we credit Ambassador Szekely's testimony as to the territorial constraints of Article 86 even if, for the purposes of this discussion only, Protexa is correct that the removal order could be considered valid under principles of international law.

Finally, although Protexa cites the language of the 1986 Federal Law of the Sea, it offers no satisfactory response to the fact that this law was enacted after the HUICHOL sank and that the law states not that the waters of the EEZ are "waters of federal jurisdiction," but rather that the "Law has federal jurisdiction."

Nor does Protexa offer any rationale upon which to discredit Ambassador Szekely's testimony that the 1986 law was not intended to alter the definition of "general ways of communication" contained in Article 1 of the Means of Communication Law. AAMS App. at 123-24. As Ambassador Szekley drafter the 1986 law (AAMS App. at 60-61), we choose also to credit his testimony to this effect. Thus, like the district court, we are of the opinion that Article 86 could not have provided a legal basis for the Port Captain's removal order.[31]

B. *Article 262 of the Means of Communication Law*

Article 262 of the Means of Communication Law, enacted in 1941, is the second statutory provision cited in the removal order. On its face, the article does not address wreck removal, but rather authorizes investigations into maritime casualties and provides for the appointment of two experts per investigation to accomplish this objective. The district court concluded that the article is not port-centered and conceivably could extend to a vessel located in the EEZ, as the Port Captain may perform police functions within his jurisdiction as they pertain to health, sanitation and customs. Furthermore, he serves as auxiliary to the public prosecutor. *Protexa II* at 49. However, although Article 262 permits the Port Captain to commence an investigation and appoint investigators, it does not address the question of whether the government may order a private citizen to pay for removal of a wreck to assist with this investigation, or whether the government must shoulder the removal expense itself.

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31. Protexa also argues that the district court did no consider the second component of the test for the applicability of Article 86, namely the navigational obstacle prong, other than in a "conclusory statement" that this element of the test had not been met. Protexa Br. at 37-39. We have no need to address this argument because we have found that the first element of the test has not been met.

Dr. Melo testified that Article 262 is sufficient legal basis in itself for a removal order if removal is reasonably necessary to complete the investigation. Protexa App. at 297, 306-10. However, the district court again credited the testimony of Ambassador Szekely, who stated that he 1986 Federal Law of the Sea governing Mexico's maritime areas is silent as to wreck removal and does not authorize wreck removal jurisdiction in the EEZ. *Protexa II* at 49-50. Consequently, the Ambassador concluded — and thus the district court held — that without such legal authority the government must pay for wreck removal incident to the investigation, for it otherwise would violate Article 16 of the Mexican Constitution, which requires a statutory basis a government order against an individual. *Id.* at 50-51.

We agree with the district court's conclusion, as Protexa merely contends that we should give Dr. Melo's views greater weight due to his substantial experience with the law here. Our reading of Article 262 convinces us that the article simply cannot be understood to have the broad implications Dr. Melo attributed to it. Indeed, if it did, it would be difficult to limit the scope of the section, for all sorts of things could be justified as being in aid of an investigation. For example, Article 262 could justify the holding of witnesses incommunicado or the seizure of private property without legal process or redress. We cannot believe that the Mexican Congress could have contemplated such procedures.

C. *Article 263 of the Means of Communication Law*

Article 263 of the Means of Communication Law, enacted in 1941, is the remaining statutory provision cited in the removal order. Like Article 86 of the Navigation Law, Article 263 is a wreck removal statute, but it is not dependent on the wreck being a hazard to navigation. Rather, Article 263 compels the owner of a wreck to

remove the vessel if its sinks within a port, or in the vicinity/ proximity of a port provided it affects the port. But inasmuch as Protexa does not contend the HUICHOL sank within a port, we are concerned only with whether it sank within the vicinity/proximity of a port and affected the port.

Ambassador Szekely testified that the more restrictive word "vicinity" is the more appropriate interpretation. Thus, the phrase "affects the port" reflects a legislative determination that it is necessary to protect the interests of navigation within the port and navigation to and from the port. *Protexa II* at 46. The Ambassador focused on Article 33 of the Administrative General Regulations for the Police of Ports (the "Port Regulations"), promulgated in 1941, to support this view. Article 33 compels removal of a wreck which sinks within a port or which interrupts navigation. However, Dr. Melo interpreted the phrase "affects the port" in an economic sense, testifying that the law must be interpreted in light of the connection between the oil fields and the two ports servicing them. Protexa App. at 291-95. Consequently, Protexa argues that Article 268 is not limited to protecting navigational interest, but rather that is applies here because the sinking of HUICHOL in the oil fields directly affected the commerce of the ports involved. Protexa Br. at 41.

The district court accepted Ambassador Szekely's view, adopting the navigational interest interpretation of the article and the more restrictive translation of "vicinity." *Protexa II* at 47. Since the HUICHOL did not sink within a port or in the vicinity of a port, but rather 45 miles from the coast, its location could not interrupt navigation to and from the port. Consequently, the district court held that the Port Captain's order was not authorized by Article 263. *Protexa II* at 47. Protexa rejects this interpretation and argues that Article 33 should not be read to restrict the open-ended

language of Article 236, and that "common sense" dictates that the legislature contemplated wrecks affecting the port in more ways than merely obstructing navigation in and to the port. Protexa Br. at 40-41.

We adopt the holding of the district court, however, as Protexa's reading of the article to comprise wrecks which affect the port in an economic sense surely is more strained and artificial than Ambassador Szekely's interpretation. In taking this position, we view Article 263 of the Port Regulations as illuminating the kinds of concerns behind Article 263. Moreover, we cannot believe that when the Mexican Congress passed Article 263 in 1940, it envisioned that it would be applied as Protexa would have us today, *viz*, to a wreck located some 45 miles off the coast in international waters. Indeed, we think that under Dr. Melo's interpretation, an order could be issued under Article 263 for removal of wreck hundreds of miles from Mexico if such a wreck could affect a Mexican port in an economic sense.

Thus, our analysis of the Mexican statutes cited in the Port Captain's order as authority for requiring Protexa to raise the wreck leads us to conclude that the district court was correct in holding the order invalid under Mexican law.[32] As the order was not

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32. Although Protexa argued in the district court and argues on appeal that the removal order was valid under principles of international law without reference to the domestic legislation cited by Mexico to justify its actions, we will not predicate a decision regarding the validity of the order on the basis of legal authority not invoked by the Port Captain to justify his order. In fact, on the basis of the record, it also appears that when the Marine Mercante issued its own opinion affirming the Port Captain's order, it too did not seek to justify the actions taken on the basis of separate principles of international law. *See* Protexa Reply Br. at 10-11.

While the district court held on remand that even if UNCLOS had been cited it

(Cont'd)

a valid order, Protexa's removal of the HUICHOL was not "compulsory by law" under the terms of the insurance contract between it and the insurance companies. Consequently, Protexa is not entitled to recover the expenses of raising the wreck from the insurance companies.

VI. CONCLUSION

Based upon the aforesaid analysis, we will affirm the judgment entered on May 14, 1993, in favor of the insurance companies.

(Cont'd)
would not have justified the order, we decline to consider whether the order was consistent with the provisions of the international law of the sea as enacted into Mexican law. Given the quite fluid and complex circumstances surrounding the sinking of the HUICHOL and the issuance of the removal order, we believe that as concerns the validity of the order, and therefore the "compulsory by law" question, all of the parties involved — Protexa and the insurance companies — should be entitled to rely upon the legal authority cited in the order in making their determinations. The Mexican authorities chose not to ground their actions on principles of international law. Protexa, a private corporation and thus not an entity of the Mexican government, should not now be heard to argue that their removal of the HUICHOL was "compulsory by law" based upon authority not cited in the order nor considered at the time. When a removal order has been issued and its authority cited, determining whether legal compulsion exists should not require speculation as to other possible unstated grounds. We also point out that the circumstance that actions are justified under international law does not mean that as a matter of domestic law they are valid. For example, we do not doubt that as a matter of international law officials of the Immigration and Naturalization Service could enforce exclusionary policies against aliens not authorized by American law. Nevertheless, in a deportation case we look to domestic law to determine whether a deportation order is lawful. While we recognize that there may be some situations in which international law in itself may justify governmental actions, perhaps the suppression of piracy, we surely are not confronted with such a case here.

Appendix B

Documentary Appendix

A. *The Port Captain's Order*

SUBSECRETARIAT OF OPERATION
DIRECTORATE GENERAL OF MERCHANT MARINE.
OFFICE OF THE CAPTAIN OF THE PORT
SECTION OF MARINE SHIPS
OFFICIAL COMMUNICATIONS
CP-3312-23-3350
File.1
OFFICE OF THE CAPTAIN OF THE PORT
CALLE 20 No.29
P.O. Box 24100

RE: This is a communication concerning salvage of the vessel 'HUICHOL' of your Company

Cuidad del Carmen,
State of Campeche
December 17, 1985

TO:
CAPTAIN CARLOS H. MERINO GARCIA DE ALBA
CHIEF OF MARINE OPERATIONS OF THE COMPANY
"CONDUX," S.A. DE C.V.
AV. PERIFERICO 8 North
CITY.—

This Maritime Authority is pleased to resolve after analysis of the procedures conducted by it in connection with the sinking of National Motor Vessel ("Buque Motor de Posicionamiento Dinamico Nacional") named "HUICHOL" having the following

characteristics: 499.83 gross tons, 151.57 net tonnage, registered in this Port under number 2623 and owned by your Company (to) refer the following procedures to Higher Authority (in order) to request Expert Opinions from technical personal and reports as to the causes that occasioned the sinking of said Vessel at the following coordinates marked by radar: Latitude 19 degrees and Longitude 91 degrees 58.5' W., and therefore, based on the Sole Article published in the Official ("Diario Oficial") of the Federal Government dated March 28 of this year and on Articles numbers 86 of the Law of Navigation and Maritime Commerce ("Ley de Navigation y Comercio Maritimo") and 262 and 263 of the Law of General Means of Communication ("Ley de Vias Generales de Comunicacion"), requests that such Company "CONDUX" S.A. de C.V., deposit the sum of Pesos $10,000,000.00 (Ten Million Pesos and 00/100, Mexican Currency) to guarantee the cleaning up of the area and the salvaging of said Vessel, in addition to guaranteeing any damage or loss that may arise in the course of the salvage operations, hereby stating by way of clarification that such sum may be furnished by a Bond or Deposit or Guaranty ("Billete de Deposito") furnished by an Insurance Company to the name of the Treasury of the Federal Government and for availability to the General Directorate of the Merchant Marine, a term of 25 days from the date of notification of this resolution hereby being granted as provided in the above cited Article 86.

Respectfully,
The Captain of the Port,
s.)
CAP.ALT. I.G. MIGUEL A. REBOLEDO GUIOT

(Seal of the United Mexican States)
(Seal of the Directorate General of Merchant Marine
Office of the Captain of the Port

Appendix B

Cuidad del Carmen, State of Campeche)
Copies: To the DIRECTOR GENERAL OF MERCHANT MARINE. —
For the information of Higher Authority.—
Respectfully.—
Jose Maria Ibarran No. 47.—
03900 Mexico. D.F.

B. *The Law of Navigation and Maritime Commerce (1963)*

Article 86

If a ship runs aground or sinks in a port, in an area considered as such in terms of the last paragraph of Article 33, or in a general waterway of communication, in a manner that constitutes a navigational obstacle or that affects navigational obstacle or that affects navigation, it shall be removed within the period set forth by the Navy Department, by the owner, the ship owner, or by anyone with a legal interest in the ship; all of whom are severally liable for the fulfillment of this obligation. If the ship is not removed within the established period, the Department will make a cost evaluation which will serve as the basis to make, the claim of the corresponding rescue cost pursuant to the administrative execution proceedings established in the Federal Tax Code, and the Navy Department shall proceed by itself, or with the intervention of a third party, to carry out the necessary works to effect the removal.

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Article 6

Questions which may arise over the interpretation of . . . what pertains to general means of communication by water . . . shall be decided by the provision of: a) This Law and other laws on communications by water and their regulations; as well as by the international treaties duly ratified by Mexico; 6) The Law on General Means of Communication. . . .

Article 9

For the purposes of this law:

I. The following are goods of maritime domain and national property:

a) The territorial sea and the inshore marine waters;

b) The continental shelf, the submarine tunnels of the islands, islets and reefs adjacent to the ports, lakes, lagoons or estuaries communicating with the sea, in the terms set forth in the Political Constitution for the Mexican United States and in the international treaties duly ratified by Mexico;

c) The canals communicating the marine spaces;

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d) The navigable rivers . . .

e) The seashores . . .

f) The portion of the sea and inshore zone being a part of the port premises;

g) The ports, bays, roads and inlets;

h) The docks, decks . . .

i) The resources and proceeds of the goods listed in the foregoing subparagraphs; and

j) The constructions and installations made by private companies or individuals in goods of the maritime domain, when reversed[33] in favor of the Nation.

II. The following goods shall be subject to the regime of the goods of the maritime domain, when they are part of the port premises or the services to which this law refers are affected:

a) The navigable canals, when related to inshore waters;

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33. In a version of this article in a supplement to Protexa's brief, the word "reversed" appears in the text. We think that "reserved" may be the correct word.

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b) The navigable lakes and lagoons;

c) The sea and inshore zone;

d) The banks and federal zones adjacent to the river beds . . .

e) The pieces of land recovered from the sea or from the estuaries.

III. The general means of communication by water are the territorial seas and the *other waters of federal jurisdiction*, when they can be used for navigation. They include the works and installations which constitute the maritime or fluvial terminals and the areas necessary for providing port and maritime services.

IV. The areas subject to the regime applicable to the goods of maritime domain and devoted to the establishment of the facilities and to the rendering of the services to which this law refers, shall be considered as port premises.

(Emphasis supplied).

Article 33

The locations of shorelines and of banks of rivers, lakes and estuaries that have not been declared ports, or that are under construction, will be considered ports for the application of

the provisions of this Law with respect to vigilance, police and maritime accidents.

C. *The Law of General Means of Communication (1940)*

Article 1

I. The territorial waters, in the extent and terms established by law and by international law;

II. The floatable and navigable rivers as well as the floatable and navigable tributaries, provided they are in any of the following cases:

a) Whenever they terminate in the sea, or in a lake, lagoon, or a stream of the kind referred to in the following section;

b) Whenever they serve totally or partially as a geographic border for the national territory, or between two or more states;

c) Whenever they cross from one state to another;

d) Whenever they cross the border of another country.

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III. Floatable or navigable lakes, lagoons, and streams, provided they comply with any of the following requirements:

a) Whenever they communicate permanently or at times with the sea;

b) Whenever they are connected with constant water courses;

c) Whenever they serve totally or partially as a geographic border for the national territory, or between two or more states;

d) Whenever they cross state lines;

d) Whenever they cross the border of another country.

IV. Channels destined or to be destined for navigation whenever they fall into any of the cases described in Sections II and III hereof.

Article 262

In the event that of shipwreck, fire, collision, running aground, or of any other accident outside a port which affects the cargo, the crew or any other persons aboard, the captain shall proceed to conduct an investigation recording the events in the navigation recording the events in the navigation diary, or binnacle

substituting it, with an obligation to inform the maritime authorities upon arrival to port. If the accident occurs in the port, notice will of course be given to the maritime authorities, which will proceed to conduct the corresponding investigation informing the Communications Department as soon as possible. The latter, may if it is deemed appropriate, appoint two experts who will give an opinion on the cause of the accident and on any parties presumed responsible. Once the investigation is terminated the results thereof shall be turned over the Federal District Attorney within the term of five days.

Article 263

In the event of shipwreck within port, or in the vicinity [vicinity] [proximity] thereof provided it affects the port, the owner or any interested company shall proceed to remove the wreck within the period set forth by the Harbormaster's office; provided, however, that the provisions of Article 47 hereof will apply in the event that there is a refusal to carry out the necessary works.

D. *Administrative General Regulations for the Police of Ports (1941)*

Article 33

The Chief of the Police of the Port shall compel

the patrons or owners of the vessel sinking within a port (or in places which interrupt navigation), to float them, to remove them or to destroy them within a reasonable time limit after which, if the order has not been observed, the Federation shall proceed to its destruction or auction, without such measure exempting the Captain, patron or owner of the vessel from the payment of the expenses incurred, nor from the obstruction fine that maybe imposed on them. . . .

E. *The United Nations Convention on the Law of Sea (UNCLOS)*

Article 55 — Specific Legal Regime of the Exclusive Economic Zone

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

Article 56 — Rights, Jurisdiction and Duties and Coastal State in the Exclusive Economic Zone

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose

of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters super adjacent to the sea-bed and its subsoil . . .

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

* * * * * *

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

Article 60 — Artificial Islands, Installations and Structures in the Exclusive Economic Zone

In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:

* * * * * *

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(b) Installations and structures for the purposes provided for in article 56 and other economic purposes;

(c) Installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

3. Due notice must be given of the construction of such artificial islands, installations or structures and permanent means for giving warnings of their presence must be maintained. Any installations or structures which are abandoned or disused shall be removed to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization. . . .

4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.

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F. *The Mexican Constitution*

Article 16

Article 16 of the Mexican Constitution provides that "no one may be bothered in his person, family, domicile, papers or possessions, except by means of written order issued by a competent authority providing the basis and the reasons of the legal cause for the proceedings."

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED MAY 12, 1993

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No.
86-4212

GRUPO PROTEXA, S.A., et al.,

Plaintiffs,

v.

ALL AMERICAN MARINE SLIP, et al.,

Defendants.

OPINION

APPEARANCES: GERALD LILOIA, ESQ.
KENNETH VAN DEVENTER, ESQ.
RIKER, DANZIG, SCHERER, HYLAND & PERRETTI
One Speedwell Plaza
CN 1981
Morristown, NJ 07960
(Attorneys for Plaintiffs)

Appendix C

HAROLD K. WATSON, ESQ.
GREGORY F. BURCH, ESQ.
LIDDELL, SAPP, ZIVLEY & HILL
3500 Texas Commerce Tower
Houston, TX 77002
-and-
DAVID J. D'ALOIA, ESQ.
SAIBER, SCHLESINGER, SATZ & GOLDSTEIN
One Gateway Center
Newark, NJ 07102-5311
(Attorneys for Defendants)

WOLIN, District Judge

This is an insurance coverage case.[1] It involves the interpretation of the wreck removal provision of a marine insurance policy. The critical inquiry is whether the wreck removal was compulsory by law. Subsumed within that inquiry are a panoply of Mexican laws whose interpretation impact on the application of this policy provision. In a prior opinion, the Court held, after a bench trial, that the removal was not compulsory by law. *Grupo Protexa, S.A. v. All American Marine Slip,* 753 F. Supp. 1217, 1236 (D.N.J. 1990). On appeal, the United States Court of Appeals for the Third Circuit rejected the analytical framework of the court and adopted the rationale set forth in *Seaboard Shipping Corp. v. Jockaranne Tug Boat Corp.*, 461 F.2d 500 (2d Cir. 1972). In *Seaboard Shipping*, the Court held that " 'compulsory removal'

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1. To characterize this matter as an insurance coverage case understates the gravity of the occurrence wherein twenty-seven Mexican seamen lost their lives when the Huichol II sank in the Bay of Compeche on December 14, 1985. This significant loss of life occasioned a national day of mourning, and this Court is not unaware of the heightened sensitivities that surround this unfortunate event.

is a term of art referring to a situation in which a hull . . . pursuant to government order . . . must be removed from navigable waters." *Id.* Likewise, the Third Circuit has stated that removal is "compulsory by law" if it is directed by governmental order. *Grupo Protexa, S.A. v. All American Marine Slip*, 954 F.2d 130, 138 (3d Cir. 1992) ("*Grupo I*").

To determine whether the removal in this case was compulsory by law, the Court must examine a document authored by the Port Captain for Cuidad del Carmen on December 17, 1985. While this writing is generically referred to as the Port Captain's Order, the parties vehemently disagree as to its status. Grupo Protexa, S.A. (Grupo) contends that it is an order that required immediate removal of the wreck. All American Marine Slip (AAMS) submits that the document amounted to nothing more than a notice to post a bond. AAMS advances several reasons why the writing is not an order and further asserts that, even if the Court were to construe it as an order, it is not a valid order in accord with statutory and constitutional precepts of the Republic of Mexico.

In the Court's original opinion, it did not decide whether the Port Captain's order was in fact a valid order of removal. Rather, the Court assumed, without deciding, that the Port Captain's removal order was valid. *Grupo*, 753 F. Supp at 1228. Because the Court adopted the Fifth Circuit's cost-benefit analysis, it did not view a direct government order as an alternative basis to provide insurance coverage under the phrase "compulsory by law." *See Progress Marine, Inc. v. Foremost Insurance Co.*, 642 F.2d 816 (5th Cir.), *cert. denied*, 454 U.S. 860, 102 S. Ct. 315 (1981); *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365 (5th Cir. 1983). However, because the Third Circuit now interprets "compulsory by law" to include wreck removal by direct government order, the Court must determine if the Port Captain's

order in this case was a valid removal order. *Grupo I*, 954 F.2d at 138. If the Port Captain's order was valid, then Protexa was entitled to recover under the policy provision in question. *Id.*

On remand and at the further proceedings anticipated by the Court of Appeals, each of the parties produced witnesses who had not previously given testimony on the status of the Port Captain's order. These witnesses were Miguel Angel Rebolledo, the Port Captain; Ignacio Melo, an expert in Mexican maritime law; Bernard Oxman, an expert in international law and the United Nations Convention on the Law of Sea (UNCLOS); Albert Szekely, an expert in Mexican law of the sea and UNCLOS; Francisco Alva Rosas, an acting Port Captain; and David Pockett, an expert in wreck removal and salvage operations.[2] Depositions of Pockett and Robert Umbdenstock were also read into the record. Thus, the case on remand and retrial appeared nothing like the initial hearing. The latter proceeding's central focus was the Port Captain's writing, commonly called the "Port Captain's order."

While it may seem that the Court of Appeals' mandate requires little more than a re-reading of the Port Captain's order, such is not the case. The Third Circuit noted, "The meaning of the Port Captain's order under Mexican law cannot be determined solely on a literal reading of the English translation. . . ." *Grupo I*, 954 F.2d at 138. In the following analysis, the Court relies upon the relevant testimony of the witnesses, their interpretation of the Port Captain's order and their interpretation of the Mexican Constitution and the relevant statutes that regulate Mexico's coastal and international waters. Moreover, the Court incorporates by reference its prior findings of fact as set forth in *Grupo*, 753 F.

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2. Pockett testified in the prior proceeding. The thrust of his testimony at the earlier proceeding focused on Protexa's salvage operation.

Supp. 1217. Because the physical contours of this remand proceeding are markedly different from the first hearing, any factual discrepancy will be controlled by this Opinion.

Overarching the validity of the Port Captain's order is whether the Port Captain, as a representative of the Mexican government, possesses the authority to order a private citizen to raise and remove a wreck beyond Mexico's territorial sea without specific statutory authority enabling him to do so. Because Protexa was a private citizen when its vessel, the Huichol II (Huichol), sank and the sinking occurred outside of Mexico's territorial waters, this inquiry is especially appropriate.[3] Given that the Republic of Mexico models its Constitution after that of the United States, the due process inquiry is as relevant under the Mexican Constitution as it would be under the United States Constitution.

The answer to the inquiry centers on the interplay between Mexico's exercise of its sovereign power in relation to the due process rights of its citizens. If the sovereign's exercise of power is unbridled or authorized by law, then the Port Captain's order is valid. If the Port Captain's order is in fact unauthorized by law or is proscribed in the constitutional sense, then the order is invalid.

I. DOCUMENTARY EVIDENCE

A. The Port Captain's Order

On December 17, 1985, the Port Captain of Cuidad del Carmen issued a written order. Its English translation was received in evidence as Exhibit 8. Because it still represents the ignition that

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3. Although the Huichol was owned by Protexa, it sailed under the flag of Panama.

Appendix C

sparks the engine of this litig[illegible]on, the Court reproduces its text at length:

SUBSECRETARIAT OF OPERATION
DIRECTORATE GENERAL OF MERCHANT MARINE.
OFFICE OF THE CAPTAIN OF THE PORT
SECTION OF MARINE SHIPS
OFFICIAL COMMUNICATION CP-3312-23-3350
File.1

OFFICE OF THE
CAPTAIN OF THE PORT
CALLE 20 No.29
P.O. Box 24100

RE: This is a communication concerning salvage of the vessel 'HUICHOL' of your Company

Cuidad del Carmen, State of Campeche
December 17, 1985

TO;
CAPTAIN CARLOS H. MERINO GARCIA DE ALBA
CHIEF OF MARINE OPERATIONS OF THE COMPANY
"CONDUX", S.A. DE C.V.
AV. PERIFERICO 8 North
CITY.-

This Maritime Authority is pleased to resolve after analysis of the procedures conducted by it in connection with the sinking of National Motor Vessel ("Buque Motor de Posicionamiento Dinamico Nacional") named

Appendix C

"HUICHOL" having the following characteristics: 499.83 gross tons, 151.57 net tonnage, registered in this Port under number 2623 and owned by your Company, (to) refer the following procedures to Higher Authority (in order) to request Expert Opinions from technical personnel and reports as to the causes that occasioned the sinking of said Vessel at the following coordinates marked by radar: Latitude 19° and Longitude 91° 58.5' W., and therefore, based on the Sole Article published in the Official Newspaper ("Diario Oficial") of the Federal Government dated March 28 of this year and on Articles numbers 86 of the Law of Navigation and Maritime Commerce ("Ley de Navegacion y Comercio Maritimo") and 262 and 263 of the Law of General Means of Communication ("Ley de Vias Generales de Comunicacion"), requests that such Company "CONDUX" S.A. de C.V., deposit the sum of Pesos $10,000,000.00 (Ten Million Pesos and 00/100, Mexican Currency) to guarantee the cleaning up of the area and the salvaging of said Vessel, in addition to guaranteeing any damage or loss that may arise in the course of the salvage operations, hereby stating by way of clarification that such sum may be furnished by a Bond or Deposit of Guaranty ("Billete de Deposito") furnished by an Insurance Company to the name of the Treasury of the Federal Government and for availability to the General Directorate of the Merchant Marine, a term of 25 days from the date of notification of

this resolution hereby being granted as provided in the above cited Article 86.

Respectfully,
The Captain of the Port,
s.)
CAP.ALT. I.G. MIGUEL A. REBOLLEDO GUIOT

(Seal of the United Mexican States)
(Seal of the Directorate General of Merchant Marine
Office of the Captain of the Port
Cuidad del Carmen, State of Campeche)

Copies: To the DIRECTOR GENERAL OF MERCHANT MARINE.-

For the information of Higher Authority
Respectfully-
Jose Maria Ibarran No 47.-
03900 Mexico, D F

In the body of this document reference is made to Article 86 of the Law of Navigation and Maritime Commerce and Articles 262 and 263 of the Law of General Means of Communication The Law of Navigation and Maritime Commerce was enacted in 1963, while the Law of General Means of Communication was enacted in 1941. Because witnesses differed over the meaning of these statutes, other portions thereof will be referenced.

Appendix C

B. The Law of Navigation and Maritime Commerce (1963)

1. Article 86

If a ship runs aground or sinks in a port, in an area considered as such in terms of the last paragraph of Article 33, or in a general waterway of communication, in a manner that constitutes a navigational obstacle or that affects navigation, it shall be removed within the period set forth by the Navy Department, by the owner, the ship owner, or by anyone with a legal interest in the ship; all of whom are severally liable for the fulfillment of this obligation. If the ship is not removed within the established period, the Department will make a cost evaluation which will serve as the basis to make, the claim of the corresponding rescue cost pursuant to the administrative execution proceedings established in the Federal Tax Code, and the Navy Department shall proceed by itself, or with the intervention of a third party, to carry out the necessary works to effect the removal.

2. Article 6

Questions which may arise over the interpretation of . . . what pertains to general means of communication by water . . . shall be decided by the provisions of: a) This Law and other laws on communications by water and their regulations; as well as by the international

treaties duly ratified by Mexico; 6) The Law on General Means of Communication. . . .

3. Article 9, Paragraph III

The general means of communication by water are the territorial seas and the *other waters of federal jurisdiction,* when they can be used for navigation. They include the works and installations which constitute the maritime or fluvial terminals and the areas necessary for providing port and maritime services.

(Emphasis supplied).

4. Article 33

The locations of shorelines and of banks of rivers, lakes and estuaries that have not been declared ports, or that are under construction, will be considered ports for the application of the provisions of this Law with respect to vigilance, police and maritime accidents.

C. The Law of General Means of Communication (1940)

1. Article 262

In the event that of shipwreck, fire, collision, running aground, or of any other accident outside a port which affects the cargo, the crew or any other persons aboard, the captain shall proceed to conduct an investigation recording

the events in the navigation diary, or binnacle substituting it, with an obligation to inform the maritime authorities upon arrival to port. If the accident occurs in the port, notice will of course be given to the maritime authorities, which will proceed to conduct the corresponding investigation informing the Communications Department as soon as possible. The latter may, if it is deemed appropriate, appoint two experts who will give an opinion on the cause of the accident and on any parties presumed responsible. Once the investigation is terminated the results thereof shall be turned over to the Federal District Attorney within the term of five days.

2. Article 263

In the event of shipwreck within port, or in the vicinity [vicinity] [proximity] thereof provided it affects the port, the owner or any interested company shall proceed to remove the wreck within the period set forth by the Harbormaster's office; provided, however, that the provisions of Article 47 hereof will apply in the event that there is a refusal to carry out the necessary works.

3. Article 1

I. The territorial waters, in the extent and terms established by law and by international law;

Appendix C

II. The floatable and navigable rivers as well as the floatable and navigable tributaries, provided they are in any of the following cases:

a) Whenever they terminate in the sea, or in a lake, lagoon, or a stream of the kind referred to in the following section;

b) Whenever they serve totally or partially as a geographic border for the national territory, or between two or more states;

c) Whenever they cross from one state to another;

d) Whenever they cross the border of another country.

III. Floatable or navigable lakes, lagoons, and streams, provided they comply with any of the following requirements:

a) Whenever they communicate permanently or at times with the sea;

b) Whenever they are connected with constant water courses.

c) Whenever they serve totally or partially as a geographic border for the national territory, or between two or more states;

d) Whenever they cross state lines;

e) Whenever they cross the border of another country.

IV. Channels destined or to be destined for navigation whenever they fall into any of the cases described in Sections II and III hereof.

D. Administrative General Regulations for the Police of Ports (1941)

1. Article 33

The Chief of the Police of the Port shall compel the patrons or owners of the vessel sinking within a port (or in places which interrupt navigation), to float them, to remove them or to destroy them within a reasonable time limit after which, if the order has not been observed, the Federation shall proceed to its destruction or auction, without such measure exempting the Captain, patron or owner of the vessel from the payment of the expenses incurred, nor from the obstruction fine that maybe imposed on them. . . .

E. The United Nations Convention on the Law of Sea (UNCLOS)

1. Article 55 - Specific Legal Regime of the Exclusive Economic Zone

The exclusive economic zone is an area beyond

and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

2. Article 56 - Rights, Jurisdictions and Duties of Coastal State in the Exclusive Economic Zone

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters super adjacent to the sea-bed and its subsoil . . .

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to

(i) the establishment and use of artificial islands, installations and structures;

* * *

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

3. Article 60 - Artificial Islands, Installations and Structures in the Exclusive Economic Zone

1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:

* * *

(b) Installations and structures for the proposes provided for in article 56 and other economic purposes;

(c) Installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

3. Due notice must be given of the construction of such artificial islands, installations or structures and permanent means for giving warnings of their presence

> must be maintained. Any installations or structures which are abandoned or discussed shall be removed to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization. . . .
>
> 4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.

F. The Mexican Constitution

1. Article 16

Article 16 of the Mexican Constitution provides that "no one may be bothered in his person, family, domicile, papers or possessions, except by means of written order issued by a competent authority providing the basis and the reasons of the legal cause for the proceedings." The Mexican Supreme Court has interpreted this article to provide:

> According to Article 16 of the Federal Constitution, all acts of authority must be properly and sufficiently based and reasoned; the former meaning, that the legal provision applicable to the case must be mentioned in a precise manner; and the latter meaning, *the special circumstances, particular reasons or*

> *immediate causes which were taken into consideration for the issuance of the act of authority, must also be mentioned in a precise manner . . . .*

Published in the Appendix to the "Seminario Judicial de la Federacion" (Weekly Judicial Gazette of the Federation) 1917-1985, Third Part, Second Chamber, Number 373, pages 636 and 637 (emphasis added). Moreover, the Court further explained, "[t]he responsible authorities do not comply with the Constitutional obligation of giving the legal foundation and duly reasoning the resolutions they issue by expressing the factual reasons and the legal considerations on which they have [been] based, whenever all of the foregoing appears in a different document." *Id.*, Eighth Part, Thesis Common to the Plenum and Chambers, Number 153, pages 248 and 249. Defendants' Brief at 3.

II. TESTIMONIAL EVIDENCE

A. Miguel Angell Rebolledo

Miguel Angell Rebolledo is the Port Captain for the Ports of Carmen And Cayos Arcos. Tr. 27 at 15.[4] He has been the Port Captain for approximately ten years. With the Port Captain's permission, the Huichol anchored in an anchor-prohibited zone due to bad weather. Tr. 29 at 4; Tr. 31 at 15; Tr. 34 at 2. Additional reference should be made to the blacklined area in Exhibit 206.[5] Anchorage is prohibited because of the presence of oil platforms

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4. Tr. 27 at 15 refers to trial transcript page and line.

5. A prototype of Exhibit 206 has been prepared by the Court and is attached as Exhibit A.

and submerged oil pipelines. Tr. 29 at 9; Tr. 30 at 5. The Huichol sank approximately forty-five miles from the Port of Carmen and beyond the twelve-mile limit, which denotes Mexico's territorial sea. The wreck of the Huichol lay in waters that comprise the Exclusive Economic Zone (EEZ). Additional reference should be made to the blue-lined area in Exhibit 206. Although the EEZ rests within international waters, Mexico may exercise its sovereign right to explore, exploit, conserve and manage the natural resources located within the EEZ. Tr. 29 at 12. As Port Captain, Rebolledo has limited jurisdiction over the waters of the EEZ. Tr. 33 at 15. He is primarily concerned with the safety of the area. Tr. 35 at 4.

At the direction of the Marine Mercante, Captain Rebolledo issued the order, *see* Exhibit 8, on December 17, 1985. Tr. 43 at 11; Tr. 44 at 9. He tendered several justifications for why he wrote the order. The main reason was the Huichol's location in a high safety zone. Tr. 40 at 24; Tr. 50 at 18. It was Rebolledo's opinion that all wrecks in a high safety zone must be removed. Moreover, because the Attorney General had commenced an investigation, the Captain believed that removal was required. Tr. 54 at 16. If the Port Captain were unable to provide reasons for the Huichol's sinking, the wreck had to be raised, in the opinion of the Port Captain, to permit the Attorney General to make this determination. Tr. 42 at 14; Tr. 55 at 15. Rebolledo communicated to the Federal Prosecutor that a probable cause determination as to the reasons for the sinking should be reserved until after a visual and physical inspection of the ship. Tr. 57 at 21. The Port Captain also felt that the location of the wreck was in an area that affected the Port of Carmen. Tr. 52 at 20. Because of the loss of life, tremendous pressure existed to immediately recover the bodies of the crew. Tr. 52 at 1; Tr. 79 at 1. The sinking of the Huichol and the loss of life that occurred was a tragedy of such magnitude that it precipitated a

national day of mourning. Tr. 73 at 25. As a result, it was important politically to commence removal without delay. Tr. 81 at 14.

Captain Rebolledo relied on the Law of Navigation and Maritime Commerce and the Law of General Means of Communication as the legal basis for this order. Tr. 46 at 24. Despite his concern for safety and his opinion that the Huichol constituted an obstacle to maintenance activity in the oil field, Tr. 53 at 2, 9, no technical analysis as to potential movement of the wreck, threat to existing oil pipeline and structures, and environment impact was performed prior to issuance of the order.[6] Tr. 63 at 24; Tr. 64 at 1-5. Nor did Petroleos Meicanos (PEMEX) exert any pressure for wreck removal. Indeed, it was Captain Rebolledo who attempted to pressure PEMEX and enlist their cooperation. Tr. 73 at 8. Moreover, prior to his issuance of the order, he was never told by Protexa that the Huichol was rapidly sinking in the mud. Tr. 81 at 25. Lastly, the Huichol wreck lay more than five hundred meters from any oil platform. Tr. 89 at 19.

When questioned about the language of the order and the absence of explicit statements that the wreck was a hazard to navigation or a detriment to the marine environment, Captain Rebolledo answered that it is not necessary to recite the pertinent portion of the Articles word-for-word and that the entire document contains an order to raise the wreck. Tr. 90 at 11; Tr. 91 at 8. The directive to remove the Huichol is in the whole document. Tr. 36 at 18.

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6. Pockett testified that oil exploration companies such as PEMEX prepare and maintain charts where oil pipelines are laid. T. 584 at 21. No testimony was provided to demonstrate whether the Port Captain sought access to these charts. Seemingly, a review of these charts would impact on the threat of damage to submerged pipelines, as well as the associated environmental risk.

Appendix C

Captain Rebolledo acknowledged that there is a difference between geographic supervision and subject matter jurisdiction of the Port Captain. Tr. 67 at 13. His jurisdiction over the EEZ exists by virtue of presidential decree. Tr. 68 at 1. His authority and control within the EEZ, however, is only as authorized by law. Tr. 70 at 11.

The Court finds that Captain Rebolledo believed that he had jurisdiction to issue the order of December 17, 1985 and that he intended Exhibit 8 to serve as a wreck removal order.

B. Ignacio Melo

Ignacio Melo is a well-respected admiralty lawyer who has provided legal advice on varying facets of wreck removal approximately twenty-five to thirty times. Tr. 102 at 3. In his opinion, the Port Captain's order was valid. Tr. 105 at 20. The intent of the order to remove the wreck is clear and does not require sacramental words. Tr. 107 at 12-19; Tr. 108 at 1. Although he admitted that the Huichol sank in the EEZ outside of the twelve-mile territorial water limit, the Port Captain may still order wreck removal. Melo based this opinion on Mexico's maintenance of sovereignty over the EEZ. Tr. 111 at 4. He pointed to Articles 56 and 60 of UNCLOS as authority for removal because Mexico signed UNCLOS and incorporated it into its internal law. Tr. 111 at 16; Tr. 114 at 7-16.

He acknowledged that Article 86 of the Law of Navigation and Maritime Commerce (1963) refers only to territorial waters because it was written prior to the concept of the EEZ. Tr. 117 at 7. However, because Article 9 includes other waters of federal jurisdiction, Melo believed that the EEZ is a general means of communication by water. Tr. 119 at 5; Tr. 120 at 8-17. Furthermore,

the phrase "other waters of jurisdiction" as used within Article 9 means waters that Mexico has jurisdiction over, not waters that Mexico necessarily owns. Tr. 206 at 24.

The legal basis for Melo's approval of the Port Captain's reliance on Article 263 is the language "provided it affects the port." While Article 86 requires a hazard posed to navigation as a prerequisite to this Article's applicability, Article 263 does not. Tr. 123 at 2. He interpreted "affects the port" in an economic sense by associating the oil field activity with the commerce in the Ports of Carmen and Cayos Arcos. Tr. 123 at 19; Tr. 124 at 6.

His reliance on Article 262 as appropriate statutory authority for a wreck removal order arose from the Port Captain's ability to commence an investigation. Tr. 126 at 11-23. He related the right to investigate and the right to issue an order of wreck removal as concepts of public order to be handled by the government. Tr. 127 at 17.

Lastly, Melo opined that administrative review was not available to Protexa and that Melo would not have brought an Amparo action in the Mexican courts on Protexa's behalf. Tr. 129 at 15; Tr. 133 at 4. He also rejected the use of the Fortuna Del Mar doctrine as too risky. Tr. 136 at 5.[7]

Melo conceded at trial that, according to the Mexican Constitution, a statute must exist before the government can order an individual to engage in a given act. Tr. 151 at 18. Additionally, sufficient facts must exist to invoke the statute's application. *Id.* at 10.

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7. Fortuna Del Mar permits an owner to abandon the vessel to the government without the attachment of liability, provided the vessel sank as a result of nautical and not personal fault.

Appendix C

In a discussion on jurisdiction, he distinguished between the subject matter jurisdiction of the Port Captain and the geographical limits of the port's jurisdiction. Tr. 160 at 17; *see generally* Tr. 152-59. Moreover, he noted that the geographical jurisdiction of the port arises from Presidential Decree. Tr. 160 at 1. Most notably, the limits of the port are the limits of pilotage. *Id.* at 14.

When pressed on cross-examination as to the validity of the order, Melo was satisfied that the order's reference to the sinking ship and its recitation of specific laws fulfilled the mandate of Article 16 of the Constitution. Tr. 168 at 1-14. He refused to accept Article I of the Law of General Means of Communication as a limitation of what constitutes a general means of communication by water. In support of his view, he explained that Article I has been abrogated by Article 9, paragraph III of the Law and Navigation and Maritime Commerce. Tr. 177 at 10-22; Tr. 178 at 1-11.

Because the Huichol was of Panamanian registry, the law of the flag has primary authority over the vessel. Tr. 181 at 7. Melo stressed that Mexico would not be prohibited from the investigation of a foreign flag vessel in waters covered by Mexican jurisdiction pursuant to Article 262. Tr. 182 at 5; Tr. 184 at 3. Wreck removal under Article 262 would be inappropriate, however, unless removal is necessary for investigation. Tr. 184 at 3.

Given that the Port Captain did not cite to UNCLOS in his order, Melo assumed that the Port Captain apparently did not rely on UNCLOS for the order's validity. Tr. 190 at 5-15. Additionally, although Articles 263 and 86 did not mention the EEZ, it is well known and accepted that the government can order wreck removal despite the government's lack of physical capacity to remove a wreck. Tr. 191 at 10; Tr. 196 at 19.

Appendix C

C. Bernard Oxman

Bernard Oxman is a Professor of Law at the University of Miami. Tr. 221 at 24. He is an acknowledged expert in international law and the law of the sea. Tr. 227 at 12. He concluded that the Port Captain's order was not a violation of international law. Indeed, in his opinion, the order was consistent with Mexico's rights and duties under international law. *Id.* at 21. From an international point-of-view, Professor Oxman did not focus on Mexico's statutes but rather Mexico's behavior as a coastal state in international waters. Tr. 230 at 13. Professor Oxman cited several reasons to demonstrate that the Port Captain's order was consistent with international law. Tr. 231 at 2. His reasons follow:

1. Because the Huichol was owned by Mexican nationals, the state may regulate their behavior. *Id.* at 7.

2. Because the Huichol supported exploration and exploitation activity in the EEZ, Article 56 of UNCLOS permits regulation of such activity. *Id.* at 22; Tr. 232 at 2; Tr. 233 at 4.

3. The exercise of Mexico's sovereign rights in the EEZ provides it with the right to control an activity if such activity affects the zone. Tr. 234 at 24; Tr. 236 at 2.

4. Mexico also may act to protect navigation rights if Mexico judged the Huichol wreck as a substantial hazard to navigation. Tr. 236 at 19.

5. Given the proximity of submerged oil pipelines and oil platforms, a serious potential environmental risk exists. A coastal state such as Mexico may take action to prevent or mitigate the grave and imminent danger of oil pollution. Tr. 236 at 19-25; Tr.

237 at 1-10. This is especially true when the assessment of potential catastrophe risk is made under emergent circumstances. Tr. 237 at 13; Tr. 238 at 11. Private parties must obey the government's order even if the government exceeds its authority. Any claim for the exercise of excessive authority rests with the flag state — Panama in this case. Tr. 239 at 1125; Tr. 240 at 1.

6. Although not a basis of jurisdiction, Professor Oxman recognized the interest of Mexico in the recovery of the remains of its nationals. Tr. 246 at 3.

7. Given that ships of foreign flag states are free to traverse the waters of the EEZ without limitation, Mexico may exercise its sovereign jurisdiction to protect the interests of the flag state. Tr. 247 at 18.

8. International law abhors legal vacuums. If Mexico did not deal with the problem, who else would? Tr. 249 at 20; Tr. 250 at 4.

Cognate to his concern over the existence of a legal vacuum under international law, Professor Oxman believed that local statutes are to be construed consistent with the coastal state's international obligations. Thus, if two constructions of a statute are possible, the construction consistent with international law is preferred. Tr. 251 at 1; Tr. 252 at 9. Professor Oxman, however, was unwilling to agree that the statutes before the Court must be interpreted under international law as permitting wreck removal in the area of the EEZ. If two reasonable constructions were possible, then international law prefers a construction that would permit Mexico to meet its obligations without necessarily amending its statutes. Should the statutes be interpreted as inapplicable beyond the twelve-mile limit, then the Mexican legislature will have to enact a new statute to meet its international obligations. Tr. 252 at

23 Tr. 253 at 15. Additionally, Mexico's application of territorial sea law to the EEZ would not violate international law unless Mexico exceeds its jurisdiction by its interference with another state's rights. Tr. 256 at 15; Tr. 257 at 24.

At the close of his direct testimony, Professor Oxman concluded that within the purview of Articles 56, 58 and 59 of UNCLOS, the order of removal did not violate international law. Tr. 261 at 2 - Tr. 269 at 8.

On cross-examination, Professor Oxman was unable to render a professional opinion on whether the Mexican statutes in question construed properly under Mexican law would impose obligations on private citizens to remove the wreck of the Huichol. Tr. 271 at 2-6. Furthermore, he was unable to express an opinion as to whether Mexico had implemented its internal law to conform to its rights and obligations under Articles 56-60 of UNCLOS. Tr. 271 at 7-16.

Finally, Professor Oxman suggested that, although the main negotiating session took place in 1974 at the Third United Nations Conference on the Law of the Sea, the concept of the EEZ was generally accepted into international law in 1975-1976. Tr. 273 at 18 to 274 at 18.

D. Alberto Szekely

Alberto Szekely is a career officer of the Mexican Foreign Service who holds the title of Ambassador by designation of Mexico's President. Tr. 276 at 20. He is currently on a leave-of-absence from the Mexican foreign service and testified before the Court in his private capacity as an expert in Mexican Law of the Sea and International Law of the Sea. Tr. 277 at 15; Tr. 299 at 3-6.

Appendix C

Ambassador Szekely, similar to Professor Oxman, possesses extensive academic credentials in international maritime law. Moreover, he was the legal adviser to the Mexican delegation to the Law of the Sea Conference and retained that position from 1973 until 1982. He is familiar with the relationship between Mexican laws on sea matters and the rules that govern the International Law of Sea Convention. When Mexico modified its Constitution to create the EEZ, Szekely participated in the draft of legislation to accomplish that. Hence, the Federal Marine Law — passed in December of 1985 and effective in January, 1986 — incorporates the terms of UNCLOS. Tr. 282 at 10 - Tr. 283 at 20. He has also published books on Mexican Law of the Sea. Tr. 285 at 14.

In his testimony, Ambassador Szekely distinguished International Law of the Sea from Mexican maritime law. The former he referred to as "public law" while the latter is a matter of "private law." Tr. 286 at 23 to 287 at 15. According to Szekely, the Mexican government's authority to order wreck removal is not a question of private maritime law, but rather a matter of public law. Tr. 286 at 10. He couches the issue as follows: Did the Mexican government have authority to issue a wreck removal order which is purely a matter of "public law" as determined by the statutes concerned with Mexican Law of the Sea.

Ambassador Szekely admittedly has never participated in any Mexican maritime law cases, has no experience with wreck removal orders, and has never participated in an Amparo proceeding arising from a maritime occurrence. Tr. 288 at 18 to 289-19; Tr. 294 at 8. Nevertheless, he has experience in the application and interpretation of the Law of Navigation and Maritime Commerce. Tr. 293 at 13.

At the outset of his testimony, Ambassador Szekely refused to

concede that the Port Captain's order was in fact an order. Tr. 303 at 21. Assuming arguendo that it was an order in fact, Ambassador Szekely did not believe it was valid. Because Mexican law as it pertains to wrecks is location-oriented and assesses a wreck's impact on navigation, the failure of Exhibit 8 to include those basic ingredients makes it invalid and inapplicable to the wreck of the Huichol. Tr. 304 at 2-20.

Ambassador Szekely was asked about the status of UNCLOS under Mexican law and the relation of UNCLOS to the Federal Marine Law. He explained that when Mexico ratified UNCLOS, it became part of the supreme law of the land and is therefore incorporated into Mexican law. Tr. 305 at 17. The Federal Marine Law adopted by the Mexican Congress and published in 1986 brought UNCLOS into Mexican law. Tr. 305 at 23 - Tr. 306 at 1-3. The Federal Marine Law deals with all of the waters where Mexico can exercise jurisdiction and it specifies what rights and obligations Mexico may exercise on the basis of UNCLOS in Mexico's marine zones. Tr. 305 at 5. The marine zones to which he had reference are as follows:

1. Internal Waters. He described these waters as those inside the territorial sea and not part of the territorial sea. These include waters subject to federal jurisdiction and local waters located within the states. Tr. 308 at 18.

2. Territorial Sea. This area is commonly referred to as the twelve-mile limit which is the property of Mexico. Tr. 309 at 4.

3. Continuous Zone. An additional twelve-mile zone serves as a buffer zone to protect the territorial sea and extends up to twenty-four miles from the coast. Tr. 309 at 10.

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4. Continental Shelf. An area measured from the outer limit of the territorial sea wherein Mexico has sovereign rights for the purposes of exploring, exploiting, conserving and managing the natural resources of the continental shelf. Tr. 309 at 18; Tr. 310 at 3-25.

5. Exclusive Economic Zone. Previously referred to as the EEZ, wherein Mexico has sovereign rights to explore, exploit, conserve and manage the living and non-living resources located in this zone. Tr. 309 at 22.

It is undisputed that the Huichol sank in the seabed of the EEZ. Tr. 311 at 11.

Only certain statutes permit the government to require the owner of a ship to remove its wreck. They are the Law of General Means of Communication and the Law on Maritime Navigation and Commerce. Tr. 311 at 20; Tr. 314 at 7. Article 16 of the Mexican Constitution — the principle of legality — is the due process clause of the Mexican Constitution. It requires a statement of facts and the recitation of a legal provision before a citizen can be given a government order. Tr. 314 at 11. Under Article 263, for Article 16 to apply, a vessel must sink in a port or in proximity affecting the port. It is a location-oriented provision. If the vessel sinks outside of the port, it must affect the port. Tr. 315 at 12. A port in accord with Mexican law is a location designated as such by statute. The federal executive fixes the limits of the port by decree. Tr. 315 at 25 - Tr. 316 at 11. Both Cayos Arcos and Carmen have been declared to be ports under Mexican law. Tr. 316 at 19. Only the port limits of Cayos Arcos have been established by decree. Tr. 316 at 21. Where port limits are designated by a decree, they are deemed to be consistent with the limits of pilotage. Tr. 317 at 16. Exhibit 384 describes the port limits of Cayos Arcos. The Huichol

did not sink within the Cayos Arcos port limits. *Id.*; Tr. 318 at 23. Carmen's pilotage limits are measured by a one nautical mile semicircle drawn from the landing buoy of the port which would give the port a 7.9 nautical mile limit from the coast. Tr. 320 at 3-9. The waters of the port are deemed to be internal waters.

The jurisdiction of the office of port captain is a concept different from the limits of the port. His jurisdiction can extend beyond that of the port. Tr. 321 at 7. What the Port Captain can do in his jurisdiction also is controlled by statute. Tr. 321 at 11. Outside of the limits of the port, he may perform police functions as they pertain to health, sanitation and customs. He also serves as auxiliary to the public prosecutor. Tr. 321 at 18.

The Port Captain's functions, however, are limited within a given geographical jurisdiction. Tr. 323 at 4. He is not empowered to order wreck removal at all locations within his jurisdiction, but only in defined areas according to limited criteria. Tr. 323 at 10.

Article 263 applies to only two geographic locations. First, it applies to the port proper. Second, Article 263 is applicable outside the port, provided the event is proximate to and affects the port. If the wreck sinks within the port, it need not affect the port for the Port Captain to order its removal. Tr. 324 at 8-15. The phrase "affect the port" in his opinion was a legislative directive to protect the interest of navigation to and from the port and within the port. Tr. 325 at 1-13. In support of his interpretation of legislative intent, the Ambassador reviewed Article 33 of the Administrative General Regulations for the Police of Ports promulgated in 1941, which compels owners of a vessel sinking within a port or in places which interrupt navigation to remove them within a reasonable time limit. Tr. 326 at 2. Accordingly, interruption of navigation was the effect on the port that the legislature sought to prevent. Tr. 326 at 23. So,

according to Ambassador Szekely, neither Article 263 nor Article 33 support removal of the Huichol because it did not sink in a port or in a place that could interrupt navigation to or from the port. Tr. 327 at 8-17.

Ambassador Szekely also disagreed with the applicability of Article 86 of the Law of Maritime Navigation and Commerce. This law passed in 1963 is also location-oriented in its design. Its wreck removal reach is limited to a port, an area considered to be a port by Article 33 of this law, or a general waterway of communication, in a manner which constitutes either a navigational obstacle or in a manner that affects navigation. Tr. 328 at 17 - Tr. 329 at 1-18. Removal from a general waterway of communication is subject to the condition that the wreck is a navigational obstacle or affects it. These provisions, the Ambassador suggests, further buttress his construction of Article 263 by their focus on the port and the legislative interest in navigation within the port free of wrecks. Tr. 329 at 19-24.

The phrase "general waterway of communication" is defined in Article 1 of the Law of General Means of Communication. The first section describes territorial waters, while the remaining sections pertain to federal waters. Tr. 330 at 21. The wreck of the Huichol was not within a general way of communication. Tr. 331 at 17. Article 9, Paragraph III of the Law on Maritime Navigation and Commerce makes reference to the general means of communication by water and the phrase "other waters of federal jurisdiction" refer to sections II, III and IV of Article I. They are all waters of federal jurisdiction, separate and apart from international or foreign waters. Tr. 332 at 5 - Tr. 333 at 6. Article I of the Law of General Means of Communication is still valid and has not been abrogated or derogated by subsequent statutory enactments. Tr.

334 at 7; Tr. 358 at 15; Tr. 359 at 1.[8] He finds support for his position by the Law of Navigation and Maritime Commerce's reference to the Law of General Ways of Communication in three distinct articles. They are: Articles 6, 9 and 86. In his opinion, the outer limit of the general way of communication by water is the territorial sea which is the property of Mexico. Tr. 336 at 21 - Tr. 337 at 14. Because the Huichol sank in the EEZ, a marine zone subject to an international treaty and not owned by Mexico, its occurrence location cannot be construed as a general way of communication by water. Removal would not be proper without further enabling legislation.

Ambassador Szekely stressed that international law and respect for international law is a major component of Mexico's foreign policy.[9] Tr. 338 at 9. To assert that the statutes cited by the Port Captain in his order were applicable to the EEZ would constitute a violation of international law. Tr. 341 at 1.[10] Those statutes pertain only to areas that are designated as property of Mexico, the coastal state, and violate international law because the EEZ is not the property of the coastal state. Tr. 341 at 5. Furthermore, he reasoned that just because international law does not explicitly prohibit Mexico to do certain things, it does not mean certain actions taken are necessarily legal. Tr. 345 at 7. This is especially true when a particular governmental order involves and affects a private citizen. To order a private person to do something, the government must respect the principle of legality. There must exist statutory authority as well as facts that make the statute

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8. Ignacio Melo disagrees. Tr. 117 at 10-22; Tr. 178 at 1-11.

9. Mexico maintains no army and a small navy. Instead, Mexico regards international law as "the greatest weapon" in its arsenal. Tr. 338 at 14-17.

10. Professor Oxman disagrees.

applicable. Tr. 345. Under international law, Mexico could have passed a statute to permit the removal of a Mexican-owned vessel in the EEZ. Tr. 345 at 18. It did not.

Ambassador Szekely also found the Port Captain's order invalid on a strict interpretation of international law. He explained that the Huichol was a Panamanian flag vessel and that the Articles cited in the Port Captain's order are territorial based and only apply to Mexican flag vessels. Tr. 346 at 2-12. Regardless of ownership, foreign flag vessels require the intervention of the foreign flag government. If they are not consulted, it is a violation of international law. Tr. 347 at 20 to 348 at 1.

When the Law on Maritime Navigation and Commerce was passed in 1963, the Mexican Congress did not intend to include the EEZ within the definition of General Way of Communication by Water. Tr. 351 at 9. The EEZ concept did not exist in 1963. Tr. 354 at 18. Ambassador Szekely explained the delicate negotiations that led up to acceptance of the EEZ as a concept in or about 1971. Tr. 351-55. What finally emerged was an agreement that there would be coexistence of sovereign rights and the rights of the international community over the waters of the EEZ. These waters were to remain free and uncontrolled by the coastal state. Tr. 355 at 18. The black-lined area on Exhibit 206 has no legal existence in Mexico. Tr. 356 at 10. A foreign flag vessel is free to sail in EEZ waters but cannot explore or exploit natural resources within the 200 mile limit. Tr. 357.

With particular reference to the Federal Marine Law of 1986, a law that Ambassador Szekely drafted, general ways of communication by water were not defined. Tr. 360 at 4. Also, the law does not contain any provision that would confer wreck removal jurisdiction on Mexico in the EEZ. Tr. 360 at 10.

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Despite the fact that the Port Captain's order did not recite any UNCLOS provisions, Articles 56 and 60 could not have been cited by him as authority for the Mexican government to order Protexa's removal of the Huichol. Tr. 363 at 23 to 364 at 3. Article 60 is irrelevant because the Huichol was not a structure and the wreck of the Huichol was not within the five hundred meter zone of navigational jurisdiction surrounding a structure. Tr. 364 at 21 to 365 at 1. The black-lined area on Exhibit 206 is not a high security or safety area because it was not legally established by a decree and published in the Official Gazette. Tr. 365 at 24; Tr. 367 at 9. Moreover, an attempt to establish a safety area and to limit foreign navigation in the EEZ would violate international law. Tr. 368 at 6-12. In fact, Mexico has not taken legislative advantage of the right granted to it by Article 60 of UNCLOS to establish a 500 meter safety zone around each of its installations. *Id.* at 18.

As to whether Article 56 of UNCLOS applies, Ambassador Szekely acknowledged that Mexico had a right to pass a statute that would permit wreck removal in the EEZ. Tr. 369 at 22. Any such statute would have to be consistent with the five hundred meter zone of navigation because of the insistence of the international community to keep the high seas free and passable. Tr. 370 at 16. No such statute has been passed. Neither have any statutes or decrees been passed pertaining to the protection and preservation of the EEZ's marine environment. Tr. 371 at 1.

In the final phases of his direct testimony, Ambassador Szekely attacked the validity of the Port Captain's order. He refused to concede that it is an order, because it does not contain a direction to remove a sunken vessel. Tr. 372 at 20. The facts stated are insufficient, in his opinion, to apply the cited statutes. Tr. 376 at 1 to 377 at 12. More particularly, the order does not indicate that the wreck is in the port or affects the port. Tr. 378 at 10.

Additionally, it orders wreck removal at a location beyond the Port Captain's subject matter jurisdiction. Tr. 379 at 1. Article 16 considerations aside, Exhibit 8 is not an order but a communication absent any mandatory language. Tr. 386 at 19. It is a request for Protexa to post a deposit to either clean the area or to reimburse the Mexican government for its cost of removal if the sinking of the Huichol was Protexa's fault.[11] Tr. 387. Ambassador Szekely attributed the non-mandatory language of the order to the Port Captain's uncertainty as to his jurisdiction over a wreck in the EEZ, his lack of knowledge as to the cause of the sinking, the incomplete state of his investigation, and his inability to determine whether it was necessary to raise the Huichol. Tr. 400-402.

Lastly, he was of the opinion that although the Mexican government has the right to order an investigation, it did not have the authority to require Protexa to expend its own funds to raise a wreck or to assist in the government's investigation. Tr. 403 at 7. Without a legal basis, the government must pay for the investigation. Tr. 404 at 1. Ambassador Szekely concluded that he knew of no law or statute that requires a private person to pay for the expense of a government investigation. Tr. 404 at 6.

On cross-examination, Szekely reiterated his position that the Mexican government has failed to enact legislation to permit the Port Captain to order wreck removal in the EEZ. Articles 86, 262 and 263 do not apply. He distinguished the difference between an order to a private individual to remove the wreck, the Mexican government's right to remove the wreck and the owner's voluntary choice to remove the wreck to avoid incurring potential liability for

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11. The Port Captain explained that the request to post a bond was to provide funds to hire another salvor in the event Protexa did not remove the Huichol within the time limit of twenty-five days. T. 47 at 11.

damage. Tr. 414 at 9. If the Mexican government has failed to enact an appropriate wreck removal law, then it may have to assume the wreck removal cost. Tr. 414 at 25.

The remainder of his cross-examination constituted a reaffirmation of his direct testimony concerning the status of the order, its invalidity, the territorial limitations of the cited statues, the order's patent violation of domestic and international law, and Mexico's inability without an enabling statute to order a private person to remove a wreck. Tr. 446 to 464.

He further clarified certain matters which were the subject matter of his direct testimony. First, the word "cercaria" as used in Article 263 means "nearby" and the English word "vicinity" is a more appropriate interpretation than use of the word "proximity." Tr. 492. "Vicinity" is a restrictive term and is best understood when read in relation to the requirement that a sinking affects the port. Tr. 493 at 20. Second, use of the phrase "other waters of federal jurisdiction" as used in Article 9, Paragraph III, is to distinguish the federal waters from state or local waters. Tr. 500 at 23 to 501 at 1. Moreover, the waters of the EEZ are not waters of federal jurisdiction. They are the high seas and fall within the purview of Article 58 of UNCLOS. Third, Articles 263, 262 and 86 pertain only to Mexican flag ships. Tr. 507 at 21. Only a flag state may exercise jurisdiction over a vessel. Tr. 508 at 19.

Lastly, the limits of jurisdiction of the Port Captain of Carmen were decreed in 1985. Tr. 489 at 5; Tr. 490 at 1; Tr. 514 at 14; *see also* Exhibit 206. They are not waters of federal jurisdiction and should not be confused with the jurisdiction of the port which is a more limited jurisdiction. Tr. 507 at 3.

Appendix C

E. Francisco Alva Rosas

Francisco Alva Rosas is the Chief Pilot of Lazaro Cardenas and has served as an Acting Port Captain in the absence of the Port Captain. Tr. 525. It was his opinion that the anchorage prohibited zone, as represented by the black-lined area on Exhibit 206, is located in international waters and the Port Captain's permission is not required to anchor. Tr. 557 at 19. He agreed with Ambassador Szekely that the Port Captain cannot order a wreck removal beyond the twelve-mile limit. Because the Huichol was beyond territorial waters, the Port Captain could not order the wreck raised. Tr. 564. He further agreed that the Huichol was not in the proximity of the port. Moreover, it was not a hazard to navigation and it was unnecessary to raise the wreck to do an investigation. Divers could have been used preliminarily. Tr. 567.

F. David Pockett

David Pockett testified in the first trial as an expert in wreck removal and salvage. He acknowledged that oil companies such as PEMEX maintain charts where oil pipelines lay. Tr. 584 at 21. The Huichol anchored in an area as directed. Pockett inferred that PEMEX certainly knew that the area was clear of oil pipelines. Tr. 588 at 24.

He placed the wreck 1.3 nautical miles inside the eastern boundary of the anchorage prohibited area.[12] In his opinion, the nearest oil pipeline was 2.5 nautical miles from the wreck of the Huichol, and there was no evidence of future oil exploration in the area where it sank. Tr. 707 at 40; Tr. 711 at 18. The development trend of oil platforms is to the west and away from the Huichol

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12. A nautical mile is 6088 feet. There are 1853 meters to a nautical mile.

wreck. Tr. 747. The closest new oil platform is three nautical miles from the wreck of the Huichol. Tr. 752 at 3.

III. DISCUSSION

Despite Ambassador Szekely's protestations that the Port Captain's order is not an order because of the major deficiencies he highlighted in his testimony, the Court holds otherwise. Admittedly, the language of the order is imprecise and more polite than mandatory. Yet, now having had the opportunity to listen to the testimony of Captain Rebolledo and Ignacio Melo, the Court will accord Exhibit 8 order status. Notwithstanding the fact that Ambassador Szekely's criticisms of the writing were well taken and of concern to the Court, Captain Rebolledo's intent to issue an order weighs heavily in the balance. Additionally, it is unnecessary for a Port Captain to be a wordsmith in the preparation of a wreck removal order. Here, he recited that the sinking of a ship had occurred, experts had been appointed to determine the course of the sinking, the occurrence fell within the purview of certain statutory articles, the vessel must be salvaged, and that a bond must be posted within twenty-five days to guarantee any damage or loss that may arise from the salvage operation.

Both Captain Rebolledo and Ignacio Melo directed the Court's attention to the document as a whole and discount its lack of specificity as described by Ambassador Szekely. This focus comports with the atmosphere of psychological turmoil that immediately surrounded this tragic event. The Port of Carmen exists and operates in support of offshore oil exploration and exploitation. Captain Rebolledo was concerned about the safety of this area, the cause of the Huichol's sinking, the Marine Mercante's oversight and the national interest in recovery of the remains of lost crew members. Moreover, his jurisdiction for certain specified

purposes extended up to a two hundred mile limit; this area encompassed the wreck of the Huichol.

When this Court issued its prior Opinion, *Grupo*, 753 F. Supp. 1217, it commented that "no phrase in the body of the [Port captain's] Order direct[ed] wreck removal." *Id.* 1232-33. While this statement is literally true, it now proves to be inaccurate in light of Captain Rebolledo's expressed intent and a review of the order in its full text.

The determination that Exhibit 8 is in fact an order does not end the Court's inquiry. Protexa may only recover under the policy provision in question if the Port Captain's order was a *valid* removal order. *Grupo I*, 954 F.2d at 138. As the Court of Appeals stated: "Under the correct interpretation of the phrase 'compulsory by law,' the meaning and validity of the Port Captain's order are critical factors." Lurking in the background is Protexa's contention that the act-of-state doctrine precludes the validity inquiry mandated by the appellate court. Under this doctrine, Protexa asserts that an American court is precluded from judging the validity of the order. *Id.* at 139. Although this issue was raised on appeal, the Court of Appeals declined to consider it because this Court had not addressed whether the Port Captain's order was in fact an order, no less a valid order. Because the Court has now decided that the Port Captain's writing was an order and that it directed removal of the Huichol wreck, the Court will turn to consideration of the act-of-state doctrine and its alleged preclusive effect.

A. Act-of-State Doctrine

While arguably the act-of-state doctrine could be applied here, caution and fundamental fairness counsel against the use of

this judicially fashioned remedy. In *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979), this Circuit commented that "preclusion is not lightly to be imposed." *Id.* at 1293. Moreover, the policies that underlie the act-of-state doctrine are not implicated here. These policies include adherence to principles of international comity, respect for sovereign nations on their own territory and deference to the executive branch in the administration of foreign policy. *Environmental Tectonics Corp. v. W.S. Kirkpatrick & Co., Inc.*, 493 U.S. 300, 419, 110 S. Ct. 701, 704 (1990). With all due respect to Protexa and the Mexican government, this is an insurance coverage dispute between private parties and of no interest to the respective governments of Mexico, the United States or the international community. No Mexican national policy is at stake. Rather, what hangs in the balance is the decision of the Port Captain on a purely local matter that will eventually determine who will pay the bill for the wreck removal. The propriety of the Port Captain's behavior is ancillary to the real issue before the Court.

Nothing about this dispute, ongoing since 1985, has attracted the attention of the respective governments of Mexico, the United States or the international community at large. Panama, the vessel's flag registry of convenience, has remained silent. Furthermore, this Court is not creating principles of domestic and international law, but is applying them as they have been promulgated by their respective entities.

Of considerable impact to the Court's decision to forego application of the act-of-state doctrine is Protexa's use of it as a sword rather than a shield. The case law reviewed by the Court teaches that a court is less likely to invoke the act-of-state doctrine when it is interposed by the party seeking relief (citations omitted). The apparent reason for this is fair play and fundamental justice.

This is especially true in this case. Protexa chose to bring this action in the district of New Jersey and thereby deprived a Mexican court from adjudicating the validity of the Port Captain's order. Moreover, Protexa resisted AAMS *forum non conveniens* dismissal application. It would be unjust to permit Protexa the benefit of an American forum and the protection of a doctrine that would unfairly impede the defendants in their ability to assert a defense.

The Court need not reach AAMS' other territorial-based objections raised in opposition to Protexa's advance of the act-of-state doctrine. *Grupo I*, 954 F.2d at 139. Because this is a dispute between private parties, and generally not amenable to resolution by use of the act-of-state doctrine, the Court will now determine the validity of the Port Captain's order on the merits.

B. Statutes of the Republic of Mexico

1. Article 86

The Port Captain's order cited Articles 86 of the Law of Navigation and Maritime Commerce and Articles 262 and 263 of the Law of General Means of Communication. Beyond a literal reading of the Articles, Ignacio Melo and Ambassador Szekely testified as to their interpretation. Each of these witnesses are recognized an distinguished in areas of maritime law. Each agreed that the Huichol sank outside of territorial waters and in the EEZ. They disagreed as to the Port Captain's authority to order wreck removal at that location at the expense of a private citizen.

Mr. Melo submitted that Article 86 is not limited by its territorial water reference, but permits wreck removal at the wreck's location. He reasoned that the waters of the EEZ are

considered to be general means of communication by water. To arrive at that position he looked to Article 9, Paragraph III, and the phrase "other waters of federal jurisdiction." He asserted that other waters of federal jurisdiction is part of the general means of communication by water. Because Mexico has sovereign rights in the waters of the EEZ, he concluded that the waters of the EEZ are a general means of communication by water. Furthermore, other waters of jurisdiction represent a statutory anticipation that Mexico would obtain jurisdiction over waters they do not own but in waters in which they possess sovereign rights.

Ambassador Szekely offered a totally different analysis. He stressed location of the wreck and the wreck's impact on navigation as the interpretive ingredients necessary to an understanding and application of Mexican wreck removal law. Article 86 is a statute that permits wreck removal under limited circumstances. It is location-oriented in its design. Three designations are located: a port, an area considered to be a port by Article 33 or in a general waterway of communication. Additionally, the sinking of the ship must constitute a navigational obstacle or affect navigation.

While Melo reasoned that the waters of the EEZ were waters of general means of communication, Szekely rejected that notion. First, he pointed to Article I of the Law of General Means of Communication wherein the phrase "general waterway of communication" is defined. Except for Roman Numeral I of that Article, which refers to territorial waters, all its other sections pertain to federal waters.

Melo contended that Article I was abrogated by Article 9 of the Law of Navigation and Maritime Commerce, a legislative pronouncement passed twenty-three years later. Through

reference to Article 6, Szekely interrelated Article 9, Paragraph III, to the earlier enactment of Article I. Szekely explained that, except for the territorial waters of Article I, all other delineated waters were waters of federal jurisdiction. Because Article 9, Paragraph III included other waters of federal jurisdiction as a subcategory of the general means of communication by water, Article I of the Law of General Means of Communication is still valid and has not been abrogated or derogated by subsequent statutory enactments. Accordingly, in Szekely's opinion, the outer limit of the general way of communication by water is the twelve-mile limit of the territorial sea which is the property of Mexico. Because the Huichol sank in the EEZ, a marine zone beyond the territorial sea, it did not sink in a general way of communication by water.

Ambassador Szekely also debunked Mr. Melo's theory that other waters of federal jurisdiction were a statutory anticipation of Mexico's creation of the EEZ. In that regard, Szekely traced the history of the EEZ and the delicate negotiations that led up to its creation. In 1963, when the Law on Maritime Navigation and Commerce was passed, the concept of the EEZ was unformed and did not develop its physical contours until 1971. Mexico established its two-hundred mile zone in February, 1976, and ratified UNCLOS in 1982. Hence, the Mexican Congress did not intend in 1963 to include the EEZ within the definition of general way of communication by water as set forth in Article 9, Paragraph III.

Ambassador Szekely's knowledge of the statute's language and his grasp of the legislative history is compelling. The Court adopts his rationale and concludes that Article 86 is territorially based, limited to the property of Mexico, bounded by a twelve-mile border and limited to a port or in an area considered as such. Furthermore, its application is restricted to an obstacle to

navigation or one which affects it. Because none of these requirements pertain to the wreck of the Huichol, Article 86 was unavailable to the Port Captain as a legal basis for the wreck removal order. Captain Rosas's testimony was consistent with that of Ambassador Szekely.

2. Article 263

Mr. Melo relied on the language "provided it affects the port" as the legal basis for this Article's relevance. Although Article 86 requires a hazard to navigation to be applicable, Article 263 does not. He interpreted "affects the port" in an economic sense and interconnects the oil field activity with the commerce attached to the Ports of Carmen and Cayos Arcos. Captain Rebolledo expressed a similar view.

Ambassador Szekely's testimony on this Article was in disaccord with the conclusions drawn by Melo and Rebolledo. He countered that Article 263 applies to only two geographical locations. First, it applies within the port. Second, its effect outside the port is limited by proximity to the port and affect upon the port. In earlier testimony, Ambassador Szekely explained the difference between the jurisdiction of the office of Port Captain and the limits of the port. The port limits of Carmen are deemed to be consistent with the limits of pilotage. The waters of the port are internal waters. All parties agree that the Huichol did not sink within the Cayos Arcos port limits.

According to Ambassador Szekely, if a vessel sinks within the port, it need not affect the port for the Port Captain to order its removal. If the vessel sinks outside the port, however, it must be in the proximity of the port and affect the port. The parties quarreled as to whether the English translation of the Spanish word

"cercaria" as used in Article 263 means "vicinity" or "proximity." Ambassador Szekely indicated that the literal translation of the word means "nearby" and the English word "vicinity" is a more appropriate interpretation. He reasoned that vicinity is a more restrictive term than proximity and is best understood when read in relation to the requirement that the sinking affects the port.

The phrase "affect the port" in Szekely's opinion was a legislative directive to protect the interest of navigation within the port and to and from the port. In support of this premise, he focused on Article 33 of the Administrative General Regulations for the Police of Ports promulgated in 1941. That regulation compels the owner of a vessel sinking within a port or in places which interrupt navigation to remove it within a reasonable time limit. Accordingly, he reasoned, the legislative concern focused on interruption of navigation. Because the Huichol did not sink in a port or a place in the vicinity of the port and the location of the Huichol wreck could not interrupt navigation to and from the port, Article 263 was unavailable as a predicate for the Port Captain's order.

The Court agrees with Ambassador Szekely. The 7.9 nautical mile limit of the port places the Huichol wreck beyond the subject matter jurisdiction of the port. Moreover, use of the term "vicinity" rather than the word "proximity" is more reasonable in light of the legislative interest in the free flow of navigation to the port. The essence of the cited wreck removal statutes fixates on the port or its vicinity. Surely Mr. Melo's sense of economic well-being for the port, supported by Captain Rebolledo, is a sage observation, but not one that is capable of extending Article 263's grasp to an area 45 miles distant from the coast. Because no navigation was interrupted within the port or its vicinity, the Court finds that the Huichol wreck did not affect the port and that Article 263 was improperly invoked.

Appendix C

3. Article 262

This Article of the Law of General Means of Communication authorizes an investigation that arises from an occurrence outside a port which affects the crew. The plain language of the Article, particularly on line 5 of the English translation, apparently refers to the Captain of the vessel as opposed to the Captain of the port. Use of the phrase "navigation diary or binnacle substituting it" are words more closely associated with the Captain of a vessel than the Captain of the port. Additionally, the obligation to inform the maritime authorities upon arrival to port lends credence to the notion that the initial out-of-port investigation is to be performed by the Captain of the vessel. The Port Captain may, however, if deemed appropriate, appoint two experts who will give an opinion on the cause of the accident any parties presumed responsible. It then becomes the further responsibility of the Port Captain upon termination of the investigation, to turn over the results of the investigation to the Federal District Attorney within five days.

The issue before the Court as it pertains to this Article is not whether the Port Captain may initiate an investigation or whether it may order the wreck removed for a visual inspection. The pivotal question is whether the Mexican government has the authority to require a private citizen to expend its own funds to raise a wreck to assist a government investigation. Both Captain Rebolledo and Mr. Melo answered this question in the affirmative. Ambassador Szekely, to the contrary, finds no legal basis that would require a private person to pay for the expense of a government investigation unless the private citizen were at fault.

The Court is obligated to decide this issue as a matter of law and will not consider whether the Port Captain's decision was prudent or whether his investigation could have been performed

more economically by divers or remote operated vehicles (ROV's).[13] Nor will the Court's decision second-guess whether the wreck could have remained at its original location or why PEMEX was a disinterested observer to a catastrophe that occurred at or near their oil equipment. To inquire as to those matters are precisely the types of inquiry that intrude on a sister nation's sovereignty and provoke an unnecessary diplomatic incident. Goodwill and comity preclude this inquiry similar to application of the act-of-state doctrine.

It is important to note that Article 262 is not a wreck removal statute. Furthermore, unlike Articles 86 and 263, Article 262's scope is not port-centered in its reference. Conceivably, it could extend to a vessel located in the EEZ because the Port Captain may perform police functions within his jurisdiction as they pertain to health, sanitation and customs. He also serves as auxiliary to the public prosecutor. As previously noted, his jurisdiction as decreed in 1985 and delineated by the blue-lined area on Exhibit 206 is limited both geographically and functionally.

Given that Article 262 permits the Port Captain to commence an investigation and appoint investigators, it does not necessarily follow that he can burden the shoulders of a private citizen. As Ambassador Szekely noted, the Federal Marine Law of 1986 is silent as to wreck removal and does not authorize wreck removal jurisdiction in the EEZ. Without such a legal basis, Szekely concludes that the government must pay for the wreck removal incident to its investigation. Through conscious choice not to enact wreck removal provisions, the Mexican government effectively

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13. Captain Rosas testified that it was unnecessary to raise the wreck to perform an investigation. He suggested that the use of divers would have been a more reasonable alternative.

has assumed that cost for itself when it orders wreck removal as an adjunct to its own initiated investigation.

In speaking of Article 262, Mr. Melo characterized the right to investigate and the right to issue an order of wreck removal as concepts of public order to be handled by the government. Although the statement is true and unassailably correct, it begs the question as to who pays for this concept of public order. Should it be the government's obligation or should an innocent citizen be responsible for this expense?

Ambassador Szekely relied on the Mexican Constitution and the principle of legality. Because of the due process connotation of that principle as entrusted to the Mexican people by Article 16 of the Constitution, he disavows the propriety of the wreck removal order to Protexa. More specifically, he noted, "The government must respect the principle of legality." Without a statutory imperative, the Port Captain lacks authority to order a private citizen to remove a wreck at the private citizen's own expense.

If the theme "we are a government of laws and not of men" has meaning, then the principle of legality must be accorded the same respect we demonstrate toward our own "due process clause." Article 262 permits a government investigation, the appointment of investigators and a wreck removal to determine the cause of its sinking, but at government expense. Both Mr. Melo and Ambassador Szekely agreed that under the Mexican Constitution a statute must exist before the government can order an individual to engage in a given act. Both the relevant facts and the law to be invoked are constitutional precepts that must be present to warrant application of a law. Here, there is no law to apply and the facts are marginally stated. The Port Captain's order that directed Protexa to

remove the wreck at Protexa's expense under this provision was likewise invalid.[14]

4. United Nations Convention on the Law of Sea

Two initial observations are germane to this Court's analysis of UNCLOS. First, UNCLOS was not incorporated into Mexican law until 1986 when the Federal Marine Law was published. The sinking of the Huichol and the Port Captain's order predated this law's effective date. Second, the Port Captain did not cite to UNCLOS as authority to remove the wreck. Based on Article 16 of the Mexican Constitution, both Melo and Szekely agree that a statute must exist before the government can order an individual to engage in a given act. Melo concluded that, because the Port Captain's order did not cite to UNCLOS, he obviously did not rely on UNCLOS for the order's validity. These observations aside, the court will discuss the relevant portions of this convention.

Professor Oxman and Ambassador Szekely have each developed international reputations with regard to international law on UNCLOS. Each acknowledge the other's international credentials. The Court was visibly impressed with their testimony. Yet, even the best of experts disagree.

Professor Oxman rendered an opinion that the Port Captain's order was not a violation of international law and was in fact consistent with Mexico's rights and duties under international law. Unlike Ambassador Szekely's focus on statutory authority, Oxman would examine Mexico's behavior as a coastal state in

14. The wreck was raised, visually inspected and resunk in shallower waters. No cause for the wreck has ever been determined, despite the Port Captain's protestations that removal was necessary to determine cause. If the cause has been determined, it has not been publicly reported.

international waters. On page 21, *infra,* he provided a catalog of reasons that demonstrated to him that the Port Captain's order was consistent with international law. Indeed, it was his opinion that private parties must obey the government's order, even if the government exceeds its authority.

Professor Oxman further believed that, when presented with two potential, statutory instructions, local statutes are to be construed consistent with the coastal state's international obligations. Professor Oxman was unwilling to agree, however, that the- statutes set forth in the Port Captain's order must be interpreted under international law as permitting wreck removal in the area of the EEZ. He pointedly stated that should these statutes be interpreted as inapplicable beyond the twelve-mile limit and render this area essentially lawless, the Mexican legislature would have to enact a new statute to meet its international obligations. Nevertheless, he felt that application of Mexico's territorial sea law to the EEZ would not violate international law unless it interfered with another state's rights.

On cross-examination, Professor Oxman was unable to render an opinion as to whether the Mexican statutes in question would impose obligations on private citizens. Finally, he was unable to determine whether Mexico had implemented its internal law to conform to its rights and obligations under Articles 56-60 of UNCLOS.

Ambassador Szekely stressed that international law and respect for international law is a major component of Mexico's foreign policy. To apply territorial statutes to the EEZ, would violate international law. This position is contrary to Professor Oxman's. Szekely provided two reasons. First, territorial statutes pertain to the property of Mexico, the coastal state. The EEZ is not

the property of the coastal state but only an area over which they have sovereign rights. Second, simply because international law does not explicitly prohibit Mexico to perform certain acts, it does not mean certain actions taken are necessarily legal. He provided two examples of this principle. One involved an order to a private citizen without statutory authority. His other example, based on a strict interpretation of international law, restricted the application of territorial-based statutes to a Panamanian flag vessel.

Moreover, the failure to consult the flag nation and to offer intervention, despite Mexican ownership, is a pure violation of international law.

More specifically, Articles 56 and 60 could not have been cited by the Port Captain, even if he had been aware of their existence. Article 60 is irrelevant because the Huichol-as a wreck was not a structure and the wreck did not lay within the five-hundred meter zone of navigational jurisdiction surrounding a structure. Professor Oxman agreed. As Ambassador Szekely noted in the newly enacted Federal Marine Law Mexico not only chose to ignore a wreck removal provision in the EEZ, but also failed to take advantage of the zone of navigational jurisdiction to which the Court just adverted.

The Ambassador's testimony with regard to Article 56 restates prior testimony, except to emphasize that the EEZ is located in high seas and must be maintained free and passable. Therefore, any statute passed would have to be consistent with the UNCLOS provisions and particularly Article 58. Hence, the anchorage prohibited zone and high safety area which so concerned Captain Rebolledo has never been established by a decree and published in the Official Gazette. It has no legal existence and as currently constituted would violate international law if it limited foreign

navigation in the area of the EEZ. Captain Rosas observed that the anchorage prohibited zone is located in international waters and the Port Captain's permission to traverse or anchor in these waters is not required.

While the Court was impressed with Professor Oxman's overview of international law and UNCLOS, it was more impressed with his candid observations that if a territorial-based statute is inapplicable beyond the twelve-mile limit, the Mexican legislature will have to enact a new statute to meet its international obligations. This comports with Ambassador Szekely's testimony. Szekely ruled out the territorial statutes on wreck removal and deplored the absence of a wreck removal provision in the 1986 Federal Marine Law.

Professor Oxman honorably refused to step beyond the purview of his qualifications. No opinion was rendered by him on whether Mexico had implemented its internal law to conform to its international obligations nor was he able to render an opinion as to whether the Mexican statutes in question could impose obligations on private citizens. Through Szekely's foreign service career for the Mexican government, Szekely was able to supply this information. His knowledge of the Federal Marine Law and the constitutional principle of legality answered these inquiries.

According to Szekely, the specter of international law violations haunts the Port Captain's order. The designation of the anchorage prohibited zone, the lack of statutory authority to order wreck removal in the EEZ, and the failure to consult Panama are occurrences that trespass the spirit of UNCLOS. Juxtaposed against Szekely's view is Oxman's that the Port Captain's order was not a violation of international law, but was consistent with a coastal state's obligations under international law. However, none

of these recited obligations was relevant in regard to the Huichol. The Huichol was a maintenance vessel that supported PEMEX operations. The wreck rested 1.3 nautical miles outside the eastern boundary of the anchorage prohibited area. The nearest oil pipeline was 2.5 nautical miles from the wreck of the Huichol.[15] Finally, the development trend of oil platform structures was in a westward direction, away from the Huichol wreck. Because of the depth of the water, Captain Rosas testified that the wreck was not a hazard to navigation in international waters. According to Pockett and Szekely, the Gulf of Mexico is littered with sunken vessels that have never been raised from their initial place of rest. Furthermore, the Huichol was resunk at a much shallower location.

Although Professor Oxman believed as a precept of international law that private parties must obey the government's orders even if the government exceeds its authority, that expression alone does not determine the ultimate financial responsibility for the act which arises from the use of excessive authority. Here, Mexico lacked authority to force a private citizen to perform an act at the citizen's expense — the raising of the Huichol. And, although this case only concerns insurance coverage, the principle of legality must be observed and not brushed aside. Thus, even if the order had cited to UNCLOS and if Mexico had brought UNCLOS into Mexican law prior to issuance of the wreck removal order, this Court would still find UNCLOS inapplicable for all the reasons testified to by Ambassador Szekely.

CONCLUSION

Because the Port Captain's order was not valid as to Protexa,

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15. Query: What submerged oil pipeline constituted an environmental hazard to Rebolledo?

the wreck removal engaged in by Protexa was not compulsory by law. Judgment will be entered in favor of the defendants.

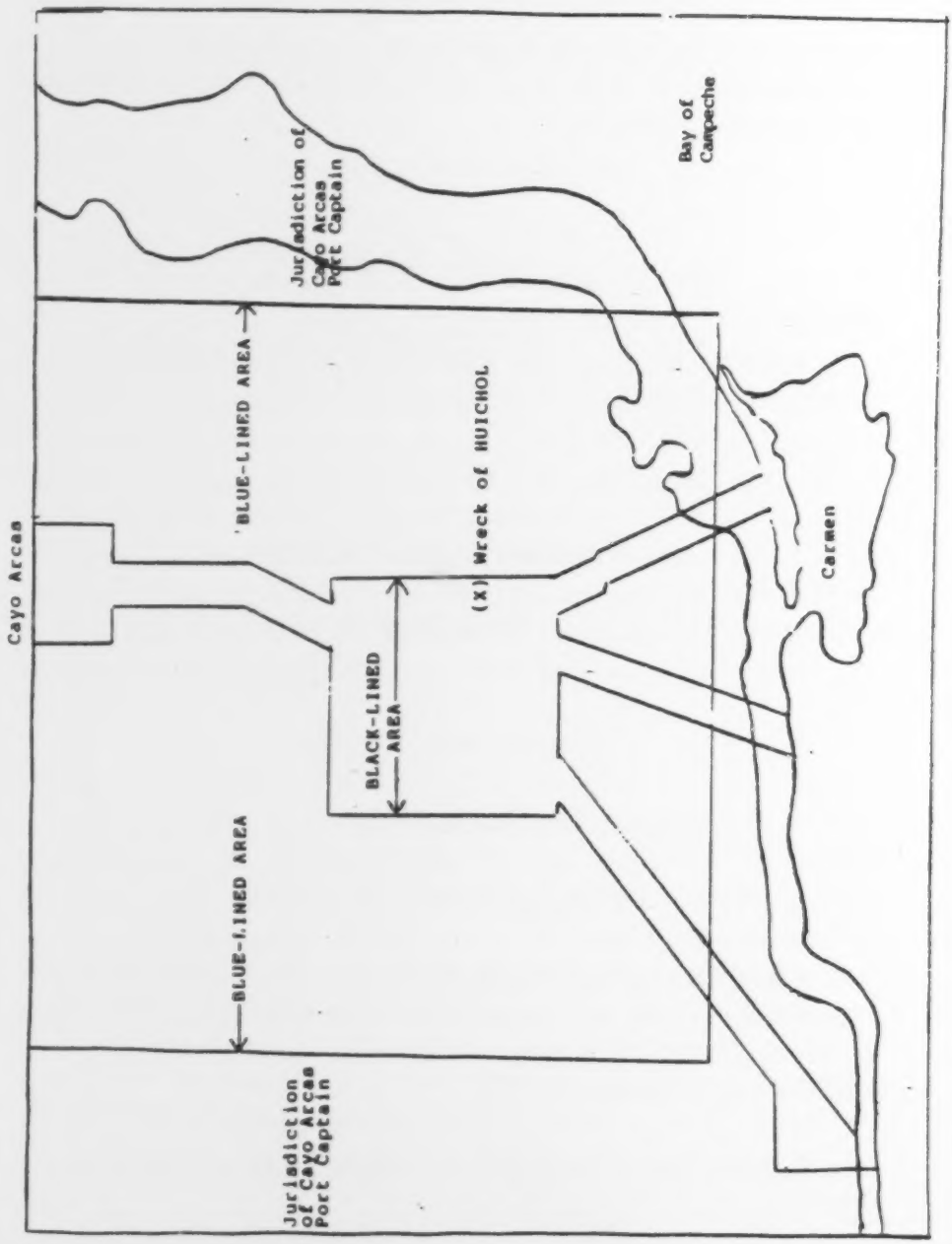
An appropriate order of judgment is attached.

Dated: May 12, 1993

s/ Alfred M. Wolin
ALFRED M. WOLIN, U.S.D.J.

Appendix C

PROTOTYPE OF EXHIBIT 206



APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS, THIRD CIRCUIT DATED JANUARY 8, 1992

GRUPO PROTEXA, S.A., a Company organized under the laws of the Republic of Mexico, and Condux, S.A. de C.V., a company organized under the laws of the Republic of Mexico, Appellants in 90-6048,

v.

ALL AMERICAN MARINE SLIP, A DIVISION OF MARINE OFFICE OF AMERICA CORPORATION, a New York Corporation; AFIA, a Delaware Corporation; and CIGNA, a Delaware Corporation, Appellants in 91-5109.

Nos. 90 6048, 91-5109.

United States Court of Appeals,

Third Circuit.

Argued June 13, 1991.

Decided Jan. 8, 1992.

Rehearing Denied Feb. 3, 1992.

Riker, Danzig, Scherer, Hyland & Perretti, Morristown, N.J. (Gerald A. Liloia, of counsel) and (Kenneth M. Van Deventer (argued), Glenn D. Curving, on the brief), for Grupo Protexa, S.A. and Condux, S.A. de C.V.

Liddell, Sapp, Zivley, Hill & LaBoon, Howton, Tex. (Harold

Appendix D

K. Watson (argued), Gregory F. Burch, of counsel), for All American Slip, AFIA and CIGNA.

Before BECKER and ALITO, Circuit Judges and HUYETT,* District Judge.

OPINION OF THE COURT

ALITO, Circuit Judge:

Assureds under a marine insurance policy sought to recover the cost of removing a sunken vessel. The marine insurance policy covered removal costs if the removal was "compulsory by law." Two insurance companies denied the claim. After a bench trial, the district court entered judgment for the insurance companies, holding that the removal was not "compulsory by law" and that the assureds had not acted as prudent uninsureds when proceeding with the removal of the wreck. Because we hold that the district court's judgment rests on incorrect conclusions of law, we will reverse and remand for further proceedings.

I.

In December 1985, the Huichol II, a diving support vessel, sank during a violent storm in the Bay of Campeche, approximately 50 miles off the coast of Mexico. More than 27 Mexican seamen were killed. The wreck of the Huichol II came to rest 1.5 miles within the eastern border of the Petroleos Mexicanos ("PEMEX") oil exploratory zone.[1]

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* Hon. Daniel H. Huyett 3rd, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

1. PEMEX is a decentralized public agency of the Mexican Federal (Cont'd)

Appendix D

The Huichol II was owned by Condux S.A. de C.V. ("Condux"), a wholly owned subsidiary of Grupo Protexa S.A. ("Protexa"). Both companies are organized under the laws of Mexico. Protexa is in the business of constructing and servicing the pipelines, platforms, and related structures needed by PEMEX. Protexa develops and manages maritime construction projects through Condux. For convenience, we will refer to the companies collectively as "Protexa."

The Huichol II was insured under a marine insurance policy placed by Protexa's broker, Energy Insurance International ("EII") of Houston, Texas. Keith Mollman ("Mollman") was the manager assigned to Protexa's account. Under the policy, five percent of the risk was placed with a Mexican company. In addition, the policy had two separate layers of coverage. The four primary-layer underwriters were liable for the first $2,500,000 of covered loss. If any single loss exceeded $2,500,000, the excess-layer underwriters would be liable. There were three excess-layer underwriters: All American Marine Slip ("AAMS"), which carried 30% of the excess layer; various Lloyds/London underwriters, which carried 65% of the excess risk; and SIGNA/AFIA, which had 5% of the excess layer. The insurance policy contained a standard wreck removal provision covering expenses the assureds became liable to pay on account of "removal of the wreck of the vessel . . . *when such removal is compulsory by law.*" App. at 1671 (emphasis added).

The day after the vessel sank, EII was notified of the incident. Acting as liaison between the underwriters and the claimants, EII

(Cont'd)
Government. It has rights to explore for oil and gas reserves in the exclusive economic zone. More than 50 oil drilling platforms and related structures belonging to PEMEX are located and operated in this zone.

called in Rush Johnson Associates ("RJA"), a worldwide firm of marine surveyors and adjustors, to survey the damage, adjust the loss, and prepare a written report for the underwriters.[2] RJA appointed Theo Tyssen ("Tyssen"), the vice-president in charge of its marine department, to handle the claim. Tyssen arrived at the scene of the wreck on December 16, 1985. On the same day, EII notified the underwriters on the policy, including AAMS and CIGNA/AFIA, that the Huichol II had sunk and that RJA's representative, Tyssen, had been sent to the wreck location.

When Tyssen reached the wreck location, he met with various parties concerning the situation. Because the wreck lay in a PEMEX zone of heavy drilling activity and because he believed that the Mexican government would want to remove the bodies of the deceased seamen and conduct an investigation, he concluded that the vessel would definitely have to be removed. Mollman sent a telex to Protexa dated December 17, 1985, suggesting that if the wreck were to be raised and moved, an immediate investigation should commence to determine if the removal was compulsory by law. The telex advised that a valid order of removal would have to be in writing and issued by an authorized governmental authority.

Immediately after the sinking, the Mexican Procuraduria General de la Republic ("PGR"), ordered ,an investigation due to the great loss of life involved. On December 17, 1985, the Mexican Port Captain for Ciudad del Carmen and the offshore port of Cayo Arcas issued a written order that, according to the English

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2. Underwriters generally receive their information from surveyors/adjustors who are hired to act as their operative at the scene of the wreck. In situations involving multiple underwriters the surveyor usually files general reports with the broker who in turn contacts the underwriters. Under no circumstances, however, is the surveyor authorized to enter into contracts on behalf of the underwriters or to commit underwriters to pay any sums in satisfaction of a claim.

translation, required Protexa to post a bond "to guarantee the cleaning up of the area and the salvaging of [the] Vessel." App. at 1407. All underwriters, including AAMS and CIGNA/AFIA, were notified of the order by EII.

Protexa interpreted the Port Captain's order as requiring immediate removal of the wreck. The Port Captain's order was referred to Protexa's legal counsel, Jorge Uriarte, for review. After a 45-minute review, Uriarte concluded that "it was clear beyond a doubt that the order had to be complied with." App. at 1166. Uriarte visited the office of the Port Captain in an effort to obtain suspension or rescission of the order but was informed that any such relief would have to be brought from officials in Mexico City. He was also informed that the Port Captain expected removal to begin without delay or the navy would take over the removal and Protexa would be punished to the full extent of the law. In addition to providing Protexa with an opinion as to the validity of the removal order, Uriarte listed five potential consequences that could result from noncompliance: 1) if Protexa did not begin removal of the vessel immediately, the Mexican government could arrange to have the wreck removed and could present Protexa with the bill; 2) Protexa faced the potential for catastrophic liability to third parties for any damage resulting from movement of the wreck within the oil field; 3) Protexa would face potential sanctions or fines, which could be imposed on a sliding scale, for failure to comply with the removal order and cooperate with the investigation; 4) Protexa risked forfeiture of the vessel and the bond; and 5) Protexa risked the destruction of its goodwill with the government and with PEMEX if it failed to comply with the order. After concluding that the removal order was valid and after weighing the potential consequences of non-compliance, Protexa did not challenge the order.

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On the same day that the order was issued, Pablo Cruz ("Cruz"), Protexa's representative, notified Mollman and requested an immediate meeting so that EII could present the removal order to the underwriters. Cruz also wanted to present Protexa's proposal to perform the removal without resort to a third-party salvor.

Mollman, Tyssen, and Cruz met in Houston on December 18,1985. They all agreed that it appeared that the removal was required and that Protexa's proposed plan was sound. In Mollman's opinion, it made sense for Protexa to remove the wreck, since the project primarily involved diving and lifting and he considered Protexa to have an abundance of expertise and equipment for this type of operation. Mollman also was aware that preliminary reports indicated that the Huichol II was quickly sinking into the mud. Mollman attempted to telephone the underwriters but was able to contact only three of them. He was not able to reach AAMS or the Lloyds/London underwriters. To those underwriters that were reached, Mollman explained the circumstances of the removal order and the need for beginning wreck removal without delay in order to minimize expenses. These underwriters agreed to waive any requirement that Protexa obtain a second or third salvage bid and advised that Protexa should begin work immediately to avoid further complications and costs.[3]

Protexa presented the underwriters with two alternatives regarding the costs of removal: 1) a fixed-sum bid to remove the wreck for $3,785,000 or 2) a daily rate of $224,608 for an estimated period of 24 days, resulting in a cost of approximately

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3. Prior to this meeting and telephone contact with the underwriters, Mollman sent Protexa a telex strongly suggesting that Protexa obtain at least one, and preferably two, outside bids forthe salvage of the vessel. He also reminded Protexa of its obligation to act as a prudent uninsured.

$5.4 million. Tyssen sent these orders to the underwriters by telex on December 19, 1985.

By December 20, 1985, all of the underwriters except AAMS and CIGNA/AFIA had agreed to the lump-sum bid assuming that there was a consensus in favor of this option. AFIA took no position and AAMS, instead of accepting either of the alternatives posed by Protexa, responded by advising that all necessary steps should be taken to minimize the loss and expressed its desire to have a third-party salvor involved, as much as possible, in the removal of the wreck. Since AAMS and CIGNA/AFIA had not approved the lump-sum basis, Mollman and Tyssen told Protexa that it should consider the job to be on a day-rate basis.

The wreck removal operation began on December 19, 1985, and Tyssen initially estimated that it would take about three weeks to remove the vessel and transport it to an approved location. Protexa's original plan involved passing slings under the wreck using cranes, but problems developed. According to Cruz, a ship passing thr[illegible]h the area during a storm snagged the Huichol II with its anchor, the wreck shifted, and debris lodged under the wreck, making passage of the slings underneath impossible. Protexa then decided to tunnel under the wreck in order to pass the slings, but progress was exceedingly slow.

During mid-January, AAMS transmitted a series of telexes voicing concern about the expense of the wreck removal, and AAMS's adjuster at the scene recommended that the salvage operation be placed out for competitive bids. A third-party salvor, Smit International, contacted RJA and Mollman and offered to perform the removal. However, Smit was not invited to bid until late January, at which time it offered to perform the removal under an agreement calling for it to receive $1.125 million if the job was

successfully completed. On the recommendation of AAMS's adjuster on site, a professional salvage master, Alex Rynecki, Inc., was hired to assist Protexa. A Rynecki employee found that the basic salvage plan was sound, but he criticized its implementation, and he made a number of recommendations that were never carried out. He advised Cruz that the only way to determine the reasonable cost for the wreck removal operation would be to secure competitive bids, and he estimated that a commercial salvor would bid between $1.1 million and $2.9 million.

After struggling with the removal operation for about 45 days, Protexa finally lifted and suspended the wreck in a crane on February 10. Recovery of the bodies began but was interrupted by bad weather. Eventually the wreck was placed back on the sea bottom in shallow water outside the PEMEX oil exploratory zone.

After removal was completed, RJA prepared its final proof of loss and forwarded copies to all underwriters. The total adjusted loss was $12,121,726. The first $2,500,000 of that loss was paid by the primary-layer underwriters, leaving a balance of $9,631,726, 5% of which remained with the Mexican insurer. The Lloyds/ London underwriters, which satisfied Protexa's claim, owed 65% of 95% of $9,631,726, or $5,947,591. Thus, AAMS, if liable, would owe 30% of 95% of $9,631,726 or $2,745,042. CIGNA/ AFIA would owe 5% of 95% of $9,631,726, or $507,000. As part of its final report, RJA again reviewed the authority of' the Mexican government to order removal and was convinced that the order was valid and required the plaintiff to remove the wreck. Both AAMS and CIGNA/AFIA, however, denied Protexa's claim.

Protexa filed a complaint in the United States District Court for the District of New Jersey. Protexa subsequently moved for summary judgment, contending that the removal costs were

recoverable because the removal was "compulsory by law." Relying on cases construing this standard policy language, Protexa argued that the Port Captain's order alone established conclusively that the removal was "compulsory by law." Protexa also maintained that the "act of state" doctrine precluded the court from deciding whether the Port Captain possessed the authority to order this removal.

The insurance companies filed cross-motions for summary judgment. They argued that the cases adopted "a balancing test of reasonableness in which three factors: the likelihood of exposure, the sanctions for failure to remove, and the cost of removal, must all be examined in order to determine if removal was, in fact, 'compulsory by law.'" App. at 40. Thus, they maintained that even a valid removal order would not conclusively show that removal was "compulsory by law." They argued, however, that the Port Captain's order in this case was invalid, and that therefore "the likelihood of exposure to sanctions for failure to remove should be considered a nullity." *Id.* at 40-41. They also contended that the act of state doctrine did not apply under the circumstances of this case.

The district court denied both motions for summary judgment and adopted an intermediate interpretation of the phrase "compulsory by law." Under the court's interpretation, neither the validity nor the invalidity of the Port Captain's order was dispositive, and consequently the court concluded that it was unnecessary to confront the order's validity or the act of state doctrine. Instead, the court held that removal was "compulsory by law" if a reasonable shipowner would have concluded that the cost of the removal was less than the probable sanctions for nonremoval. The court concluded that, in assessing the probable sanctions for nonremoval, it was necessary to take into account the likelihood that the Port Captain's order would have been sustained if challenged. *Id* at 41.

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After a bench trial, the court entered judgment for the insurance companies on two independent grounds. The court first held that the removal was not "compulsory by law" under the formula it had previously adopted. The court stated that "no phrase in the body of the [Port Captain's] Order direct[ed] wreck removal." *Grupo Protax S.A. v. All American Marine Slip,* 753 F.Supp. 1217, 1232-33 (D.NJ. 1990). Instead, the court observed, the order required the posting of a bond. *Id* at 1233. The court suggested that Protexa did not adequately consider the possibility of challenging the Port Captain's order, since Uriarte had no training in the applicable areas of law, did not obtain expert advice, concluded that the order was valid after only cursory review, and was not properly prepared when he met with the Port Captain. *Id.* at 1233-34. In addition, the court found that the potential sanctions for noncompliance with the order and the potential liability to third parties were much less than the cost of removal. *Id.* at 1236; *see also id* at 1235. Finally, the court suggested that factors other than legal compulsionpressure from the families of the deceased seamen and the possible commercial consequences of noncompliance influenced Protexa's decision not to resist the Port Captain's order. *Id* at 1232.

The court next held that, even if the removal had been "compulsory by law," Protexa was not entitled to recover due to a policy provision that the court interpreted to mean that Protexa lost all right to recovery if it breached its duty to act as a prudent uninsured. The court found that Protexa violated this duty "[w]hen [it] acted as its own salvor." *Id.* at 1237. Among other things, the court noted that "Protexa had no experience in deep water wreck removal operations," ignored AAMS' request that a third-party salvor be involved as much as possible, ignored bids by experienced salvors that were much lower than Protexa's costs, did not properly execute its removal plan, and failed to implement

recommendations by an experienced salvor. *Id.* at 1237-39. Protexa appealed. We have jurisdiction under 28 U.S.C. 1291.[4]

II.

The first question that we must decide is whether the removal of the Huichol II was "compulsory by law." In addressing this question, both sides rely primarily on four cases decided by the courts of appeals construing the phrase "compulsory by law" as used in a standard clause in marine insurance contracts. Both sides appear to agree, as the insurance companies argue, that these decisions "were well-known in the marine insurance community and had been thoroughly discussed in the marine insurance literature." Appellees' Br. at 24. Consequently, the parties to the insurance policy at issue here "will be presumed to have intended [these] words to have their proper legal meaning and effect, in the absence of any contrary intention appearing in the instrument." *Raulie v. United States,* 400 F.2d 487, 521 (10th Cir.1968) (quoting 17A C.J.S. *Contracts* § 586.)

After reviewing the decisions on which the parties rely, we conclude that Protexa's construction of the phrase "compulsory by law" is correct and that the district court's construction is mistaken. It is abundantly clear that the district court's interpretation is inconsistent with that of the Second Circuit in *Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.,* 461 F.2d 500 (2d Cir.1972). In that case, a barge carrying gasoline went aground in Lake Ontario immediately offshore Oswego, New York, and began leaking gasoline into the water and onto the

4. The district court entered an order extending the time within which the plaintiffs could file a notice of appeal, and the insurance companies filed a cross-appeal from this order. By prior order, we denied the insurance companies' request for dismissal of the plaintiffs' appeal on jurisdictional grounds.

adjacent shoreline. The Second Circuit rejected the argument that "the pressure from the Coast Guard and other governmental authorities in the Oswego also made the removal of the barge compulsory." *Id.* at 504. The court held that " 'compulsory removal' is a term of art referring to a situation in which a hull . . . pursuant to government order . . . must be removed from navigable waters." *Id.* Since no such government order had been issued in that case, the court held that the costs of removal were not recoverable under the insurance policy. In the present case, by contrast, if we assume, as the district court did, that the order of the Port Captain was a valid order requiring removal, then the cost of removal would clearly be recoverable under the Second Circuit's interpretation.

The Fifth Circuit adopted a different interpretation of the phrase "compulsory by law" in *Progress Marine, Inc. v. Foremost Ins. Co.*, 642 F.2d 816 (5th Cir.), *cert. denied*, 454 U.S. 860, 102 S.Ct. 315, 70 L.Ed.2d 158 (1981). In that case, a barge sank about eleven miles off the Louisiana coast. Although no government order was issued requiring removal, the "hurricane season was approaching and the submerged barge posed a threat to neighboring oil production facilities and workers." *Id.* at 817. Moreover, the barge "lay only eight feet below the surface of the water and posed a threat to navigation in the area, as [the barge owner] was clearly informed by the Coast Guard." *Id.* (footnote omitted). The insurance company argued that "the removal, although perhaps compelled by prudence, was not 'compulsory by law' as required by the express terms of the policy." *Id.* The Fifth Circuit rejected this argument. The court disagreed with the Second Circuit's view that "removal 'compulsory by law' *requires* a peremptory order by an authoritative government agency." *Id.* at 819 (emphasis added). The court added that this phrase "should not be viewed as *restricted* to situations in which an express direct

order from a governmental body directs removal." *Id.* at 820 (emphasis added). The court stated:

> [R]emoval occasioned by an unarticulated or unreasonable apprehension of criminal or civil liability could not be considered "compelled by law." On the other hand, where removal was reasonably required by law, or where failure to remove would have reasonabl[y] exposed an insured to liability imposed by law sufficiently great to justify the expense of removal, then, we believe, such removal could be considered "compelled by law" for purposes of recovery.

Id.

Finally, the court observed that an assured would have to possess "a subjective belief . . . that [removal] was reasonably necessary." *Id.* The court remanded the case before it for application of this new standard.

We do not interpret the Fifth Circuit's opinion in this case as rejecting the Second Circuit's view that removal is "compulsory by law" when required by a direct government order. Rather, we interpret the Fifth Circuit's opinion to mean that removal may *also* be considered "compulsory by law" in the absence of such an order when a ship owner subjectively and reasonably believes that removal is necessary based on a comparison of the probable cost of removal against the probable liability if removal is not undertaken. In the present case, therefore, if the Port Captain's order was a valid removal order (as the district court assumed), then the removal of the Huichol II would satisfy the first prong of this test.

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Two years after *Progress Marine,* the Fifth Circuit, sitting in banc, returned to the same question in *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365 (5th Cir. 1983). In that case, Conoco time-chartered a vessel from Bonanza Corporation, which retained exclusive control of the vessel. While maneuvering the vessel near a Conoco oil drilling rig in an area leased from the United States, the captain negligently caused the vessel to sink directly beneath the rig. Conoco subsequently removed the vessel and attempted to recover the removal costs under an insurance policy containing a clause similar to that at issue in the present case.

The in banc Fifth Circuit reaffirmed the interpretation set out in *Progress Marine,* with one exception not relevant here. Again rejecting the Second Circuit's interpretation, the Fifth Circuit stated that *"[r]estricting* 'compulsion' to the mandate of a governmental agency rather than according it the usual significance of the generalized command of a statute or judicial decision narrows the meaning of the term considerably and, we think, unjustifiably." *Continental Oil,* 706 F.2d at 1369 (emphasis added). "Compulsion," the court wrote, "is not exerted *only* by direct command." *Id.* (emphasis added). The court stated that it was "unable to *restrict* the meaning of 'compulsory' to acts performed in response to order." *Id.* (emphasis added). Rather, the court stated:

> Practical considerations *also* indicate that removal should not be considered compulsory by law only after specific mandate has issued. If removal were compulsory by law *only* after competent governmental authority had given its edict, then the vessel owner who removed a vessel he had negligently sunk could not recover the costs of removal even after other

> vessels had run aground on the wreck *until some governmental agency gave the peremptory command.* The owner (and consequently its insurer) would be exposed to repeated damage claims without being able to rely on policy coverage to eliminate the hazard, *unless a governmental agency ordered removal* . . . .
>
> Thus, the clause should be so construed that removal does not become compulsory by law *only* when a court has rendered judgment requiring it or when an official has issued a fiat. This does not mean that any removal undertaken to minimize possible exposure to legal liability is covered. . . . To be compelling, the duty must be clear and the sanctions for its violation both established and sufficiently severe to be impelling, that is to warrant the cost of removal . . . .
>
> In determining whether removal is legally compelled, we look to the state of affairs as they would appear to a reasonable owner under the circumstances.

Id. at 136-70 (emphasis added).

The in banc court made only one alteration in the test adopted in *Progress Marine;* it eliminated the requirement that the insured subjectively believe that removal was reasonably necessary. *Id.* at 1371. Applying this test to the case before it, the court concluded that the removal carried out by Conoco was not "compulsory by

law" as a result of Conoco's obligations under its lease agreement or under the federal regulations in force at the time. *Id.* at 1371-72. Among other things, the court observed that "[t]he regulations imposed no present duty to remove the wreck." *Id.* at 1371. The court also held that there was no settled principle of law on which Conoco, as the mere time charterer of the vessel, could be held liable by any potential claimant for damage subsequently caused by the vessel and that the probability that any such damage would occur was "slight." *Id.* at 1373.

We interpret the in banc opinion in *Continental Oil* , like the earlier panel opinion in *Progress Marine,* to impose a two-part test under which removal is considered compulsory by law if either 1) the removal is directed by governmental order, statute, or regulation or 2) if removal is reasonable under a cost-benefit analysis taking into consideration the probable cost of removal and both the likelihood and amount of liability which could be imposed for failing to remove the wreck.

We addressed the meaning of the phrase "compulsory by law" in *East Coast Tender Serv., Inc. v. Robert T. Winzinger, Inc.,* 759 F.2d 280 (3d Cir.1985). In that case, Winzinger obtained a license from the New Jersey Department of Environmental Protection ("DEP") to operate two barges on the Delaware River as a temporary loading facility. In February 1979, while covered by an insurance policy containing a clause similar to that at issue here, the barges were damaged in a storm. The policy expired at the end of March 1979, but Winzinger continued to operate the barges as a loading facility until September. In April 1980, Winzinger "received formal notice from the DEP' to remove the barges, which by that time had sunk into the river. *Id.* at 283.

In analyzing Winzinger's right to recover removal costs under

the insurance policy, we adopted "the Fifth Circuit's more expansive interpretation of the term 'compelled by law.' " *Id.* at 286. We wrote that this phrase "in the context of this type of insurance policy should not be *restricted* to situations in which an express order from a governmental body directs removal." *Id.* (emphasis added). We held that Winzinger was not entitled to recover, however, because he did not incur any legal obligation to remove the barges until after the policy term had expired. *Id.* at 286-87.

In sum, we interpret all of the decisions described above to mean that removal is "compulsory by law" if it is directed by government order. Our decision in *East Coast Tender Serv.*, and the two earlier Fifth Circuit decisions interpret this phrase to encompass *additional* cases, *viz.*, those in which removal is required by statute or regulation and those in which a reasonable shipowner at the relevant time would determine that the probable cost of removal would be less than the probable tort liability if removal was not undertaken. Accordingly, if the Port Captain's order in this case was a valid removal order, Protexa was entitled to recover under the policy provision in question.

III.

A. Under the correct interpretation of the phrase "compulsory by law," the meaning and validity of the Port Captain's order are critical factors. Relying on several statements in the district court opinion, the insurance companies contend that the district court "clearly concluded that the Port Captain's directive was not an order to remove the wreck." Appellees' Br. at 22. We disagree with this interpretation of the district court's opinion. The district court's opinion states espressly that the court would "assume, without deciding, that the Port Captain's removal order was valid"

(Grupo Protexa, 753 F.Supp. at 1228), and the portions of the district court opinion on which the insurance companies rely do not find that the order did not require removal. Rather, these portions of the opinion merely point out – correctly – that the English translation of the order does not espressly require removal. It seems clear that the meaning of the Port Captain's order under Mexican law cannot be determined solely on a literal reading of the English translation, and we do not interpret the district court's opinion as taking such an approach.

Since the district court made no finding regarding the precise meaning of the Port Captain's order, we must remand for a finding on this question. In light of the parties' arguments on appeal concerning the admission of expert testimony about this order, we note that under Fed.R.Civ.P. 44.1, expert testimony may be received regarding Mexican law to aid in interpreting the Port Captain's order. *Merck & Co., Inc. v. U.S. Int'l Trade Comm'n,* 774 F.2d 483 (Fed.Cir.1985).

B. If the Port Captain's order, as understood under Mexican law, directed removal of the wreck, then the validity of the order may be dispositive. The insurance companies argue that under Mexican law and the United Nations Convention on the Law of the Sea (UNCLOS) (21 I.L.M. 1261), which Mexico has signed, the Port Captain lacked the authority to order the removal of the Huichol II from the location where it sank. In response, Protexa argues that the act of state doctrine precludes an American court from judging the validity of the order. *See W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.,* 493 U.S. 400, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990), *aff'g, Environmental Tectonics v. W.S. Kirkpatrick Inc.,* 847 F.2d 1052 (3d Cir.1988). The insurance companies contend, however, that the act of state doctrine does not apply here because Protexa chose to sue in the United States rather

than Mexico, where the validity of the order could have been fully litigated; be cause the Huichol II sank outside Mexico's territorial waters and the act of state doctrine does not apply to extraterritorial acts; and because unambiguow provisions of UNCLOS are controlling because they establish that the Huichol II is located outside Mexican jurisdiction.

The district court has not addressed any of these questions, and we believe it would be premature for us to do so now. As noted above, it is still unsettled whether the Port Captain's order in fact directed the removal of the wreck.[5] Until this preliminary question is decided, we should not decide (a) whether the act of state doctrine prohibits an American court from deciding whether the Port Captain possessed the authority to order removal of the wreck or (b) whether the Port Captain possessed auch authority.

IV.

The district court's second, independent reason for entering judgment for the insurance companies was that Protexa breached its duty to exercise the care of a prudent uninsured with respect to the removal operation. The court held that this breach prevented Protexa from recovering *any* removal costs under the policy, even the costs that would have been incurred had the removal been performed by a professional salvor. In reaching this conclusion, the district court relied primarily on a provision of the "protection and indemnity" portion of the policy. In passing, the court also cited one case for the proposition that an insured has a duty to

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5. The act of state doctrine does not preclude a court from determining whether in fact a goverment official directed certain action. *See Kirkpatrick Co.*, 493 U.S. at 409, 110 S.Ct. at 706-07; *Interamerican Refining Corp. v. Texaco Maraccaibo, Inc.*, 307 F.Supp. 1291, 1301 (D.Del. 1970) ("whether or not a foreign official 'ordered' certain conduct is an evidentiary question" not prohibited by the act of state doctrine).

exercise the care of a prudent uninsured under a "sue and labor" clause. *Grupo Protex*, 753 F.Supp. at 1236-37. On appeal, both sides agree that cases involving "sue and labor" clauses are not relevant here. Thus, we turn to the policy provision on which the district court relied.

As noted, this provision appears in the "protection and indemnity" portion of the policy. App. at 167-74. The provision follows the heading "GENERAL CONDITIONS AND/OR LIMITATIONS" and is captioned in the left margin "Settlement of claims." *Id.* at 1673. The provision reads as follows (the language on which the district court relied is highlighted):

> The Assured shall not make any admission of liability, either before or after any occurrence which may result in a claim for which the Assurer may be liable. The Assured shall not interfere in any negotiations of the Assurer, for settlement of any legal proceedings in respect of any occurrences for which the Assurer is liable under this policy; *provided, however, that in respect of any occurrence likely to give rise to a claim under this policy, the Assured are obligated to and shall take steps to protect their (and/or the Assurer's) interests as would reasonably be taken in the absence of this or similar insurance. If the Assured shall fail or refuse to settle any claim as authorized by Assurer, the liability of the Assurer to the Assured shall be limited to the amount for which settlement could have been made.*
>
> Whenever required by the Assurer the

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> Assured shall aid in securing information and evidence and in obtaining witnesses and shall cooperate with the Assurer in the defense of any claim or suit or in the appeal from any judgment, in respect of any occurrence as hereinbefore provided.

Id.

Unlike the district court and the insurance companies, we do not interpret the highlighted language to mean that the assured's entire right to recover is conditioned upon the assured's acting at all times and in every respect as a prudent uninsured. First, it is significant that this language appears in a paragraph captioned "Settlement of claims." This placement suggests that whatever duty was created by the disputed language is restricted to the settJement of claims. Second, it is significant that the language in question appears in a proviso. This placement suggests that the language qualifies the duty imposed by the language preceding the proviso, i.e., the insured's obligation not to "interfere in any negotiations" carried on by the insurer. Thus, the most reasonable interpretation of the bare policy language was that Protexa was obligated to act as a prudent uninsured would with respect to any claims asserted by third parties. In other words, the proviso appears to be a cooperation clause. *See Martino v. Travelers Indem. Co.*, 450 F.2d 542, 553 (5th Cir.1971); L. Buglass, *Marine Insurance and General Average in the United States*, 391 (2d ed. 1981); J.A. Appleman & J. Appleman, *Insurance Law and Practice*, § 4774 (1981). While the parties could have intended this provision to have some other meaning, no evidence establishing such an intent has been called to our attention.[6] Accordingly, we hold that this

6. The insurance companies point to trial testimony by Pablo Cruz, Protexa's risk manager, and Keith Mollman, who was assigned as Protex's acoount manager by (Cont'd)

provision does not mean that Protexa's failure to act as a prudent uninsured during the removal operation would totally defeat Protexa's right to recover any removal costs.

It does not follow, however, that Protesa is entitled under the policy to recover all the costs that it incurred from what the district court found to be an extremely inefficient removal operation. Although the policy provision on removal does not expressly state that Protexa may recover only reasonable removal costs and expenses, "an interpretation which, makes [a] contract or agreement fair and reasonable will be preferred to one which leads to harsh and unreasonable results." 4 S. Williston, A *Treatise on the Law of Contracts* § 620 (3d ed. 1961); *see also* 3 A.L. Corbin, *Corbin on Contracts* § 552 (1960); G.J. Couch, *Couch on Insurance 2d* § 15:16 (rev. ed. 1984). Thus, the policy provision on removal may well be restricted to reasonable removal costs, and it is not apparent from Protexa's briefs that it disputes such an interpretation. On remand, the district court should determine the meaning of this provision and, if the provision is limited to

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(Cont'd)

Protexa's insurance broker. But assuming that these witnesses were competent to testify about Protexa's intent or the generally understood meaning of a clause of this nature in the industry, neither witness stated that this clause meant that the assured's right to any recovery was conditioned on acting at all times as a prudent uninsured. Cruz merely stated that Protexa had a general duty to act as a prudent uninsured, but he did not state that the consequence of any breach of this duty was the denial of all recovery. Mollman first stated that the policy did not expressly impose a general duty to act as a prudent uninsured but that this duty was understood. App. at 381. After the insurance companies' attorney pointed out the policy provision in question, Mollman agreed that the duty contained in the provision was "the same duty we were talking about." App. at 383. Without a contrary finding by the trial court, we are unwilling to interpret this testimony to mean anything more than that the policy provision in question embodied the duty to act as a prudent uninsured in the limited context of the settlement of claims.

reasonable costs, make findings regarding the amount of those costs.[7] The district court has already found that Protexa's removal operation was highly inefficient, and we hold that those findings are not clearly erroneous.

V.

In conclusion, we hold that the removal of the Huichol II was "compulsory by law" if removal was directed by a valid order of the Port Captain and that Protexa's inefficient removal operation does not totally preclude recovery of removal costs. We will therefore reverse the judgment of the district court and remand for further proceedings.

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7. Protexa also contends that the district court erred in dismissing its waiver and estoppel defense with respect to its alleged breach of the cooperation clause. Because we hold that this abuse does not apply to the manner in which Protexa conducted the removal operation, we need not address this argument. Finally, Protexa argues that it was not permitted to introduce evidence that the insurance companies waived or should be estopped from asserting the affirmative defense of failure to mitigate. The rulings to which Protexa refers appear to have been based on the district court's interpretation of the policy provisions discussed above. Thus our decision regarding the meaning of these provisions appears to obviate any need to address these rulings further.

APPENDIX E—OPINION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED NOVEMBER 16, 1990

GRUPO PROTEXA, S.A., et al., Plaintiffs,

v.

ALL AMERICAN MARINE SLIP, et al., Defendants.

Civ. A. No. 86-4212

Unites States District Court,
D. New Jersey,

Nov. 16,1990.

As Amended Jan. 16, 1991

* * *

Riker, Danzig, Scherer, Hyland & Perretti by Gerald Liloia, Kenneth Van Deventer, Morristown, N.J., for plaintiffs.

Liddell, Sapp, Zivley & Hill by Harold K. Watson, David D'Aloia, Houston, Tex., and Saiber, Schlesinger, Satz & Goldstein by David J. D'Aloia, Newark, N.J., for defendants.

OPINION

WOLIN, District Judge.

This is a maritime action, the substance of which centers on the wreck removal provision of a policy of insurance issued to Perforaciones Maratimas Protexa, S.A.C. ("Protexa"). The initial inquiry is whether the wreck removal engaged in by Protexa was compulsory by law. The analytical framework necessary to that determination is set forth in a prior opinion of this Court. *Grupo Protexa S.A., et al. v. All American Marine Slip, et al.*, No. 86-4212, 1988 WL 88442 (D.N.J. Aug. 26, 1988) (1988 U.S. Dist. LEXIS 9339). Cognate to that inquiry is whether Protexa, as

required by the policy, acted as a prudent uninsured. The pivotal focus of that probe is directed to Protexa's decision to remove its own wreck without resort to the use of a third-party salvor. Because of unresolved issues of fact this matter was tried before the Court.[1] In accord with Rule 52(a), Federal Rules of Civil Procedure, the following constitutes this Court's findings of fact and conclusions of law.

I. FINDINGS OF FACT

In the early morning hours of December 14, 1985, the HUICHOL II ("HUICHOL") sank in the watery depths of the Bay of Campeche. A tragic consequence of this occurrence was a significant loss of crew. More than 27 able-bodied seamen accompanied and remained with the HUICHOL until their remains were recovered on February 10, 1986. With this brief scenario at hand, the Court will move to an explanation of the events that precipitated this litigation.

A. *The Parties*

The plaintiff Grup Protexa, S.A., is a Mexican conglomerate engaged in transportation, food stuffs, bottling and canning, tourism, real estate, industrial, construction and drilling and marine operations. It conducts these commercial ventures through separate corporations. It develops and manages maritime construction projects through Condux and Construcciones Maritimas Mexicanas. Condux was the owner of the HUICHOL when it sank. Cruz Script at 2.

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1. Direct examination of in-court witnesses was presented through question and answer script. References to this testimony are designated as script at a given page, *e.g.*, "Cruz Script at ___."

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The defendant All American Marine Slip ("AMMS") is a marine insurance company, located in New York, that reinsured 30% of the reinsured risk under protection and indemnity policies issued by Mexican insurers. Guerrero Script at 2. The defendant Cigna/AFIA is a marine insurance company that reinsured 5% of that same risk. *Id.*

B. *The Wreck*

On December 14, 1985, at approximately 8:00 a.m., the HUICHOL sank in the Bay of Campeche approximately 50 miles off-shore from Cuidad del Carmen ("Carmen"). Winds in the vicinity at that time were reported to be 55 knots with seas at 3 meters and a northerly swell at 5 meters.

The wreck of the HUICHOL was located at latitude 19-25.8 degrees north, longitude 091-58.5 degrees west in 45 meters of water. It was lying on a bottom of soft mud, capsized to port at about 150 degrees. Exhibit 221D. It was lying in an inverted position within a Petroleos Mexicanos ("Pemex") oil exploratory zone.[2] Fredericks Script at 6. The wreck lay 1.5 miles within the easterly border of the Pemex zone and over three miles from the nearest oil platform structure. Umbdenstock Script at 3. More than 50 oil drilling platforms and related structures belonging to Pemex are located and operated in this exploratory zone. Cruz Script at 5. Protexa constructs and services the pipelines, platforms and related structures needed by Pemex. Moreover, Pemex's production is important to the Mexian economy, since it is a major source of Mexico's hard currency. Cruz Script at 3.

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2. Pemex is an oil and gas company which has exploratory rights in the exclusive economic zone. Pemex is a "Decentralized Public Agency of the [Mexican] Federal Government." Exhibit 202 at 001094.

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C. *The Policy*

The policy of marine insurance was written by Energy Insurance International of Houston, Texas ("EII"). Keith Mollman was an account manager assigned to Protexa's account. Pablo Cruz was Protexa's employee assigned to procure insurance and manage risks for its construction, marine and air divisions. Cruz Script at 1. In 1985 Cruz negotiated an insurance policy covering risks and property damage to all or part of Protexa's Marine Construction Division. All of the risk except for 5% was placed with non-Mexican insurance companies.[3] Cruz Script at 7. The policy written for Protexa was a Protection and Indemnity-type, designated as "SP-23 (Revised 1/56)." The policy had two distinct layers of coverage:

> The primary layer was liable for the first $2,500,000 of any loss covered by the policy. There were four primary level underwriters. They were U.S. Fire which had 35% of the primary level, Wetzel which had 27.5% of the primary layer, AOIS which had 7.5% of the primary level and FFIC which had the remaining 25% of the primary level.
>
> If any single loss exceeded $2,500,000 it pierced the excess layer and the excess layer underwriters should have to respond to the loss in excess of the primary limit. There were three excess underwriters, those being AAMS which had 30% of the excess layer and various

3. National regulations required a portion of the insurance to be placed with a Mexican company.

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> Lloyds/London underwriters which carried 65% of the risk. AFIA had 5% of the excess layer.

Mollman Script at 3.

The total adjusted loss was $12,121,726, of which the primary layer was liable for the first $2,500,000. Mollman Script at 41. Therefore, according to Mollman, the balance for which the excess layer was liable was $9,631,726. Five percent of that liability remained with the Mexican insurance company. The three remaining excess carriers, London, AAMS and AFIA were liable for their respective share of 95% of the balance. Therefore, AAMS, if responsible, owes 30% of 95% of $9,631,726, which equals $2,745,042. AFIA, if liable, would owe 5% of 95% of $9,631,726, which equals $507,000. London, which had already paid its share, owed 65% of 95% of $9,631,726, which equalled $5,947,591. Mollman Script at 41. The hull and machinery claim was $1,523,000; sue and labor,[4] $504, 065; and wreck removal, $10,104.461. Exhibit 202D at 000904. Since the hull and machinery plus sue and labor claims amounted to $2,027,065, and the primary layer of coverage as only $2,500,000, all but $472,035 of the wreck removal expenses fell squarely on the shoulders of the excess tier of coverage.

The effective date of the policy was from May 1, 1985 to may 1, 1986. AAMS had reinsured Protexa's marine risk in years prior to the policy year in issue. The 1985-86 policy differed from its predecessor in that the prior wreck removal coverage was of a

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4. The purpose of a sue and labor clause is to reimburse an insured for the expenses, such as the expenses of salvage operations and removal of cargo for safekeeping, of mitigating a covered loss. *Blasser Bros. v. Northern Pan American Line*, 628 F.2d 376, 386 (5th Cir. 1980).

broader form. It permitted wreck removal when it was compulsory by law and also when it was deemed necessary by the assured. EII had attempted to negotiate, on behalf of Protexa, the same coverage for the 1985-86 policy year, but AAMS was unwilling to provide such coverage and the policy that issued for the 1985-86 policy year provided coverage for wreck removal only when such removal was compulsory by law. Guerrero Script at 2.

The policy also required that the assured act as a prudent uninsured in the settlement of claims. Exhibit 258 at 40000591. A prudent uninsured is a term applied to assureds. It indicates that an assured's judgment should be reasonable and employed notwithstanding the existence of insurance.

D. *Claims Adjustment Process*

The established protocol for channeling communications between underwriters and the assured is the broker. Underwriters receive their information from surveyors/adjusters who are sent to the scene of a wreck for that very purpose. The surveyor is the underwriter's operative on the scene.

> He is their eyes, ears and at times their mouth. It is his responsibility to make sure the underwriters are kept fully informed of what is happening on the scene. He is also responsible for reviewing the insured's claim at the end of the process, making the appropriate adjustments, and issuing the proofs of loss by which the claims are submitted to the underwriters.

Mollman Script at 3. In a situation such as the HUICHOL with multiple underwriters involved, the surveyor files general reports

with the broker who in turn contacts the underwriters. Underwriters generally reply through the broker. The surveyor represents the underwriters and is paid by them. Mollman Script at 4.

Immediately after the loss of the HUICHOL was communicated to EII, Rush Johnson Associates ("RJA") was appointed surveyor/adjuster for the underwriters. Captain Theo Tyssen was assigned to this claim. Mollman Script at 4. Tyssen was at the scene of the wreck on December 16, 1985. Mollman Script at 6. AAMS acknowledges that Tyssen served as the eyes and ears of the underwriters. Tr. 469 at 25. However, under no circumstances was Tyssen authorized to enter into contracts on behalf of the underwriter or commit an underwriter to pay any sum in satisfaction of a claim. This was especially true of AAMS. Guerrero Script at 4.

E. *The Events Succeeding the Wreck*

After Tyssen was dispatched to the wreck, he met with various parties concerning the situation. In a report to Mollman, Tyssen advised that, according to *his* conversation with divers who had tried to do a survey, the vessel was completely saturated with water and was rapidly sinking into the muddy, silty bottom. He also said that the wreck was located in a Pemex zone of heavy drilling activities and it seemed definite that the unit would have to be removed. Furthermore, the Mexican government indicated that, after the vessel was raised and before it could be scuttled, government officials would want to remove the bodies and do an investigation into the cause of the loss. Tyssen said that he had some very preliminary discussions with Protexa's engineers regarding their estimates of time and cost for removing the HUICHOL. Mollman Script at 7.

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Meanwhile, Mollman sent an urgent telex to all underwriters, including AAMS, advising them that the HUICHOL sand in heavy weather and RJA through Tyssen, had departed for the wreck location. Exhibits 2A-J.

Mollman had also been incontact with Cruz. Based upon discussions they had and the discussions Mollman had with Tyssen, it was determined that Protexa tender abandonment of the HUICHOL to the underwriters and submit their claim for a total loss. A sample telex was provided to Protexa by Mollman on December 17, 1985. Exhibit 13. On that same date, Protexa forwarded a telex to EII for the attentionof interested underwriters. Exhibit 10. It mirrored the language contained in the sample telex. All underwriters declined to accept abandonment of the wreck.[5] AAMS never respondend to the notice. Mollman Script at 10.

Aside from Tyssen's evaluation that the government would

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5. Mollman discussed abandonment in terms of "constructive total loss":

> Where it is likely that the cost of raising the wreck and salvaging it would cost more than its insured value, it is considered a constructive total loss. Where a constructive total loss occurs, the insured has the right of tendering abandonment of the vessel to the underwriters. If the underwriters do not decline the abandonment, they are entitled to the benefit of any salvage value the vessel may have, but also liable for any third-party liability that may arise from the wreck itself. Moreover, until such time as it is determined that the vessel is a constructive loss and an abandonment tendered, the insured has a duty under the Policy to do everything in its power to prevent further loss.

Mollman Script at 9.

probably order the wreck removed, Cruz also shared that opinion. To him, removal was obvious. The wreck was in the *middle* of the oil fields. According to Cruz, thirty-three crewmen were dead. There was obviously going to be a governmental investigation into the cause of the loss and, in any case, there was no way the government was going to allow that wreck to stay there in the middle of the Pemex zone. Cruz Script at 10. Armed with this information, Mollman sent a telex to "Protexa (Cruz)" dated December 17, 1985. In the telex Mollman suggested that if the wreck was to be raised and moved, an immediate investigation should commence to determine if, in fact, the removal was compulsory by law. The telex further advised Protexa that if it was required by law to remove the wreck, the order of removal had to be in writing and issued by an authorized governmental authority. Exhibit 12.

On the afternoon of December 17, 1985, the Port Captain of Carmen issued an order that has been termed by the parties as the written wreck removal order ("removal order"). Exhibit 7. It was written in Spanish. Exhibit 8 represents an English translation of the removal order. Cruz received the order from Alcibiades Fuentes, Protexa's operations manager in Carmen. Cruz then notified EII and Tyssen. He also met with Condux Engineers for the express purpose of having them prepare a removal plan and a time estimate for removal. Upon receipt of Condux's removal plan, Cruz showed it to Tyssen and suggested that an immediate meeting be held in Houston with EII.

On December 17, 1985 Cruz also telephoned Mollman and advised him of the removal order. He expressed the desire for an immediate meeting with EII so that EII could present the removal order to the underwriters. Moreover, Cruz wanted to present Protexa's removal plan and its bid to do the removal without resort

to a third-party salvor. Mollman Script at 11. Mollman thought that Protexa's decision to remove the wreck itself made sense since it was going to be essentially a diving and lifting job. In his opinion, Protexa had an abundance of expertise and equipment for this type of operation. Mollman was also aware of the wreck's precarious position in the mud and the sense of immediacy that Protexa felt in responding to the removal order. Thus, conceptually, Mollman did not object to Protexa's offer, but acknowledged that the final determination was to be made by the underwriters. Mollman Script at 11. During cross examination of Guerrero, it was clear that he recognized that salvage operations were the full responsibility of the vessel owner and not that of the underwriters. Tr. at 2-7. However, because of his experience with Protexa in a prior claim (the stranding of the Olmeca), wherein Protexa acted as its own salvor, he was wary of Protexa's involvement in the Huichol wreck removal. Guerrero Script at 5. In fact, he felt Protexa should not do the job. Tr. 497 at 22. In later testimony, Guerrero agreed that he had no blind objection to Protexa doing the salvage job. However, Protexa should act as a prudent uninsured. Tr. 504 at 15-19. The clear import of this testimony was that Guerrero, on behalf of AAMS, wanted a bid from a third-party salvor. Tr. 500 at 1.

Mollman, Tyssen and Cruz met in Houston on December 18, 1985. Mollman Script at 11. Cruz presented the removal order and Protexa's removal plan. They agreed that it appeared that removal was required and that the removal plan was sound. Mollman attempted to telephone the underwriters, but was only able to reach three of them. He was not able to contact AAMS or the London underwriters. To those underwriters whom he reached, Mollman explained the circumstances of the removal order, the current condition of the wreck vis-a-vis the sea bottom, and Tyssen's evaluation that it was important to start the wreck removal without delay in order to minimize expenses. Mollman Script at 12. These

underwriters, in response, agreed to waive any requirement that Protexa obtain a second or third salvage bid and advised that Protexa should begin work immediately to avoid further complications and to minimize expenses. Mollman Script at 13. Confirming telexes were sent to these underwriters on December 20, 1985. Exhibits 25, 26 and 27. The substance of the underwriters' response was communicated to Cruz by Mollman and Tyssen. Cruz understood from them that the underwriters had approved Protexa for the job and that the job should commence immediately. Cruz Script at 15. Prior to this meeting and telephone contact with the underwriters, Mollman sent a telex to Protexa, in which he recounted the problems previously encountered with the Olmeca and the Kikapu. Mollman strongly suggested that Protexa obtain at least one, and preferably two, outside bids for the salvage of the vessel. He also remineded them of their obligation to act as prudent uninsured. Exhibit 266.

At the Houston meeting, the cost of the wreck removal was also discussed. Cruz provided a day rate proposal. Tyssen suggested that the underwriters be given a lump sum option. The day rate offered by Protexa was $224,608 for a period of 24 days which would result in a total cost of $5,390,592. Protexa's lump sum offer to salvage the vessel was $3,785,800. Tyssen communicated these alternative offers to interested underwriters by telex from Houston on December 19, 1985. Exhibit 21. In the telex he suggested acceptance by the underwriters of the lump sum bid. His closing paragraph requested the underwriters' advice as to whether Protexa should proceed on a day rate or a lump sum basis. He requested this advice before the close of business on December 19, 1985, before 5:00 P.M. Houston time. AAMS' copy of the telex, Exhibit 30, was not received by AAMS until December 20, 1985, the day after its designated reply was due. Clearly, AAMS could not respond to a telex in advance of its receipt. Guerrero Script at 4.

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By Decembe 20, 1985, all the underwriters had been advised that Protexa was going to do the job; that each had the opportunity to review the day rate versus the lump sum bid; and that all of them had agreed to the lump sum bid except AAMS and AFIA, who took no position. Mollman Script at 16. A caveat attached to the underwriters' acceptance of the lump sum bid was that there exist a consensus among all the other underwriters that the lump sum would be their choice. Mollman Script at 15. Wetzel accepted the lump sum price on December 20, 1985 by telex with the proviso that agreement by other "participages" can be confirmed in writing. Exhibit 23. Since it was clear that all the underwriters had not accepted the lump sum price, Mollman told Protexa that it should consider the job to be on a day rate basis. Mollman Script at 17. Cruz Script at 16.

AAMS responded to the Tyssen telex on December 20, 1985 by its own telex addressed to EII. It counseled the assured to take all necessary steps to minimize the loss and expressed their desire to have a third party salvor get involved in the removal of the vessel. Exhibit 25.[6]

Although AAMS did not clarify what is meant by its request for a third party salvor's involvement, Mollman inferred that Tyssen had explained to Guerrero's satisfaction why it made sense to use Protexa instead of a third party salvor. Mollman Script at 17. Exhibit 36 contains a reference to a Tyssen-Guerrero telephone conference of December 23, 1985. In this telex to Mollman, Tyssen stated, apparently speaking for Guerrero, that a second bid for

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6. Tyssen, in his deposition, Transcript 206 at line 8, did not remember seeing the AAMS telex, Exhibit 24. Moreover, at line 15 he acknowledged that a document such as that telex appeared to be important with reference to the job he was doing at the time.

salvage appeared to be obsolete since the HUICHOL was sinking in the mud and the vessel TOLTECA was in the area foregoing the necessity of mobilization charges. He also indicated that Guerrero was apprised of the authorities' demand for expedient removal.

Despite Tyssen's advise to Mollman as to his discussion with Guerrero, AAMS sent a telex to Tyssen on December 23, 1985 and inquired whehter there was a mandate from a regulatory body requiring Protexa to remove the HUICHOL. AAMS also indicated, *inter alia*, that it was sending its own representative, Claude Pritchett, to be present during the raising of the HUICHOL. Exhibit 34. No significant communication transpired between the parties or their agents during the remainder of calendar year 1985.

F. *The Port Captain's Order*

On December 17, 1985 the Port Captain of Cuidad del Carmen issued a written order. Its English translation was received in evidence as Exhibit 8. Because it is the ignition that sparks the engine of this litigation, the Court will set out its text at length.

> SUBSECRETARIAT OF OPERATION
> DIRECTORATE GENERAL OF MERCHANT MARINE.
> OFFICE OF THE CAPTAIN OF THE PORT
> SECTION OF MARINE SHIPS
> OFFICIAL COMMUNICATION CP-3312-23-3350
> File.1

OFFICE OF THE CAPTAIN OF THE PORT
CALLE 20 No.29
P.O. Box 24100

Appendix E

RE: This is a communication concerning salvage of the vessel 'HUICHOL' of your Company

Cuidad del Carmen, State of Campeche
December 17, 1985

TO;
CAPTAIN CARLOS H. MERINO GARCIA DE ALBA
CHIEF OF MARINE OPERATIONS OF THE COMPANY
"CONDUX", S.A. DE C.V.
AV. PERIFERICO 8 North
CITY.-

This Maritime Authority is pleased to resolve after analysis of the procedures conducted by it in connection with the sinking of National Motor Vessel ("Buque Motor de Posicionamiento Dinamico Nacional") named "HUICHOL" having the following characteristics: 499.83 gross tons, 151.57 net tonnage, registered in this Port under number 2623 and owned by your Company, (to) refer the following procedures to Higher Authority (in order) to request Expert Opinions from technical personnel and reports as to the causes that occasioned the sinking of said Vessel at the following coordinates marked by radar: Latitude 19° and Longitude 91° 58.5' W., and therefore, based on the Sole Article published in the Official Newspaper ("Diario Oficial") of the Federal Government dated March 28 of this year and on Articles numbers 86 of the Law of Navigation and Maritime Commerce ("Ley de

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Navegacion y Comercio Maritimo") and 262 and 263 of the Law of General Means of Communication ("Ley de Vias Generales de Comunicacion"), requests that such Company "CONDUX" S.A. de C.V., deposit the sum of Pesos $10,000,000.00 (Ten Million Pesos and 00/100, Mexican Currency) to guarantee the cleaning up of the area and the salvaging of said Vessel, in addition to guaranteeing any damage or loss that may arise in the course of the salvage operations, hereby stating by way of clarification that such sum may be furnished by a Bond or Deposit of Guaranty ("Billete de Deposito") furnished by an Insurance Company to the name of the Treasury of the Federal Government and for availability to the General Directorate of the Merchant Marine, a term of 25 days from the date of notification of this resolution hereby being granted as provided in the above cited Article 86.

Respectfully,
The Captain of the Port,
s.)
CAP.ALT. I.G. MIGUEL A. REBOLLEDO GUIOT

(Seal of the United Mexican States)
(Seal of the Directorate General of Merchant Marine
Office of the Captain of the Port
Cuidad del Carmen, State of Campeche)

Appendix E

Copies: To the DIRECTOR GENERAL OF MERCHANT MARINE.-

For the information of Higher Authority
Respectfully-
Jose Maria Ibarran No 47.-
03900 Mexico, D F

Pretexa interpreted this order as a wreck removal order. Cruz Script at 11. It further concluded that the government wanted it done immediately. Protexa was concerned that if they did not remove the wreck, the Navy would do it and that would be bad for Protexa. Indeed, Protexa was of the opinion that no one who does business in the Mexican Gulf would ever seriously question the Port Captain's authority to order the removal of a wreck from a Pemex exploratory zone—particularly where there had been such tragic loss of life. When the Port Captain says move, you move. Cruz Script at 18.

Cruz referred the Port Captain's order to Protexa's legal counsel with the request that it be reviewed and with the admonition that if there is a problem, Cruz should be notified immediately. He was never advised by the Protexa legal department that there were any problems. Cruz Script at 12.

A Protexa staff attorney, Jorge Uriarte, was chosen to review the order. He was a member of a response team that Protexa formed to deal with the HUICHOL situation. Exhibit 208. On December 19, 1985, he was requested to travel to Carmen. In fact, he was recommended by his immediate supervisor, Galdino Canseco, because of his prior experience as a government attorney. Because of the onset of the Christmas holidays, Uriarte was reticent to be away from home, and his reticence continued until Jose Garcia, the corporate director, agreed to provide the company's aircraft for

him to fly to Carmen and to return him home for the Christmas holidays. On December 20, 1985, Uriarte went to Carmen. Uriarte Script at 4. Before Uriarte went to Carmen, he was aware that the sinking of the HUICHOL was a serious government problem and that, due to the loss of life, the Procuraduria General de la Republica ("PGR") had ordered an investigation.[7] He also knew that the HUICHOL had sunk in a Pemex exploratory zone located in the Bay of Campeche between the Port of Carmen and the Cayo Arcas terminal. It was his opinion that the federal government exercises jurisdiction over these waters. Uriarte Script at 7. Moreover, in his opinion, the Exclusive Economic Zone extends 200 miles off shore. Furthermore, he contended that the Port of Cayo Arcas, as distinguished from the city of Cayo Arcas, is "the Pemex zone". *Id.* Since there is no Port Captain assigned to Cayo Arcas, the Port Captain of Carmen is responsible for all matters of the Maritime Authority which may occur in the jurisdiction of Cayo Arcas. *Id.* The most pressing problem for Protexa, as expressed to Uriarte by Canseco, was to obtain the release of the bodies to the families of the deceased and to provide the PGR with information that the PGR had requested as part of its investigation relating to the HUICHOL. Uriarte Script at 8.

Upon Uriarte's arrival at Carmen in the morning on Decemiber 20, 1985, he was briefed by other members of the response team. He was told of the Port Captain's order, of the underwriters' approval of Protexa to raise the wreck and of an imminent meeting with family members of the deceased crew to announce that Protexa would be raising the wreck. However, before Protexa actually started wreck removal, it wanted to rule out

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7. The PGR is the public ministry in charge of all matters in the country which are of a federal nature. The Procuraduria General is appointed by the President of the Republic and is his attorney. The PGR is similar to the United States Justice Department. Uriarte Script at 5.

the possibility of a legal challenge to the order.[8] *Id.* He was given a copy of the order and reviewed it along with the relevant statutes which define the office of the Port Captain and the limits of his office.[9] From this review, which lasted 45 minutes, he concluded that "it was clear beyond a doubt that the order had to be complied with." This decision was communicated to the Protexa people, who then announced to a crowd of survivors that the removal operation would begin. Uriarte Script at 9. He also communicated his opinion to Fernando Perez, the divisional director of Condux, by telephone. Uriarte Script at 10.

Uriarte's legal background was in criminal and general corporate law. Tr. 291 at 20. He had no training in maritime law. Tr. 291 at 17. Nor had he ever been involved in another legal matter involving removal of the wreck of a vessel. Tr. 291 at 23. Indeed, he did not know of any other cases in Mexico which dealt with a government-ordered wreck removal. Tr. 292 at 4. Resort to a legal opinion from outside counsel did not occur until after the wreck had been removed. Tr. 293 at 5. Lastly, Uriarte never issued a written legal opinion about the validity of the order to any Protexa official. Tr. 293 at 8.

Uriarte, in support of his opinion that the Port Captain's order was a wreck removal order, relied on two segments of the writing. He first pointed to the word "rescate" used in the reference line

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8. The operative date when the wreck removal commenced was stipulated as December 19,1985.

9. Authorities relied upon were The Law of Maritime Navigation and Trade, the Organic Law of Federal Public Administration, the Laws of General Ways of Communication, and The Law of Amparo. Tr. 293 at 16-23. Amparo is a very broad mechanism in Mexican jurisprudence and is loosely interpreted as an "injunction." Tr. 294 at 12.

immediately preceding the body of the order. Although he thought it meant rescue, the interpreter corrected the translation to indicate that "rescate" meant raising. Tr. 301 at 5-10. Uriarte's second point of reference was to the statutory citations contained in the body of the order. Tr. 301 at 22-25. From these points of reference, Uriarte determined that it was a wreck removal order. Tr. 307 at 18. Despite Uriarte's perception as to the clarity of the removal order, he admitted that the order did not impose a time limit on raising the wreck of the HUICHOL. Tr. 310 at 23. The 25 days mentioned in the order refers to the time limit to post a bond. Tr. 308 at 21. Another factor that influenced Uriarte that the removal order was valid was the Mexican government's sovereignty over its territorial waters and in his opinion that would include the waters in the exclusive economic zone. Tr. 316 at 10-24. When questioned about the United Nations Convention on the Law of the Sea ("Law of the Sea") and its limit on signatories' territorial waters to 12 miles from their respective coasts, Uriarte admitted he had never read it and was unaware of its provisions. Tr. 317 at 20-25. Moreover, he was unaware that the Mexican Congress had adopted the law of the Sea. Tr. 318 at 7.

Reference to potential Pemex installation damage and the order of the Port Captain directed toward investigation of the incident, as well as recovery of the dead bodies, were other factors that Uriarte considered in his determination that the removal order was valid.

On December 21, 1985, Uriarte visited the office of the Port Captain in an effort to obtain from him a suspension of the order or perhaps evern a rescission of it. Uriarte Script at 10. Uriarte observed that the Port Captain was under a lot of pressure from the Federal Public Ministry to remove the wreck from the Pemex zone and to conduct a visual and physical investigation of the

HUICHOL. Uriarte Script at 11. He was told that any rescission or modification of the order would have to occur through the officials in Mexico City. *Id.* Moreover, the Port Captain made it very clear that he expected Protexa to start the operations without delay or the Navy would immediately make the necessary arrangements for the removal and that Protexa would be punished to the full extent of the law. Uriarte Script at 12.

Uriarte reported the substance of his visit with the Port Captain to Fernando Margain, Protexa's general counsel. In that conversation, Uriarte told him that he did not see any way that Protexa could oppose the order. Marco Sotomayor, Protexa's director of finance, was similarly advised. Uriarte also contacted Carlos Paniagua, Protexa's legal director in Mexico City, so that an informal approach could be made to Captain Fraga, general director of the Merchant Marine.[10] *Id.*

Beyond providing Protexa with his opinion as to the validity of the removal order, Uriarte advised them of five consequences that could occur to it for non-compliance with the wreck removal order. They were as follows:

> [1] [T]he threat that is provided for in the relevant law, and which was affirmed to me by the Port Captain, i.e., that if we did not immediately begin the removal operation, the

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10. "The Port Captain is an administrative authority who reports to the general office of the Merchant Marine. The director of the Merchant Marine in turn reports to the Under-Secretary of Operations of the Ministry of Communications and Transportation, who in turn reports to the Secretary of Communications and Transportation." Uriarte Script at 5. The latter position is a cabinet-level ministry that regulates maritime commerce. The Secretary reports directly to the President of the Republic. *Id.*

government would make arrangements to do it itself and hold us liable. We would have absolutely no control over the conduct of the removal operation or its cost, but merely would be required to fully reimburse the government for whatever bill it presented.

[2] [T]here was the potential for catastrophic liability to third-parties if the wreck were to move within the oil field and do damage to a pipeline or other submarine installation. This liability would be almost absolute if any accident occurred after we had refused to comply with a valid removal order.

[3] [T]here was the sanctions or fines which could be imposed on a sliding scale for failure to comply with the order or to cooperate with the investigation. These fines would continue to accrue as our non-cooperation continued.

[4] There was also the risk of forfeiture of the vessel and of the bond.

[5] [T]here were obviously going to be grave consequences for our relationships with the government and with Pemex if we were to disobey an obviously valid order. It seemed clear that the government had a valid interest in getting the wreck raised and removed from the oil fields and to disobey and ignore such a valid national interest would not be wise.

Uriarte Script at 16.

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After concluding that the removal order was valid and after weighing the consequences that could occur for non-compliance, Protexa did not legally challenge the order through an Amparo proceeding. Uriarte's opinion was that the removal order as valid and that there was no legal basis for bringing an Amparo. Furthermore, a stay or suspension of the order pending determination of an Amparo was unlikely unless the district judge determined preliminarily that Protexa would prevail on the Amparo and that the failure to suspend the order would likely cause irreparable harm. Uriarte Script at 17.

G. *The Wreck Removal*

The wreck removal commenced on December 19, 1985. Tyssen, in a telex to interested underwriters, dated December 19, 1985, expressed an opinion that the removal of the wreck would take approximately 15 days, plus an additional six days to deliver it to an approved location. Because of this estimate, he suggested that the underwriters accept the lump sum bid. Exhibit 21.

The concept of the removal plan was to pass slings under the wreck using cranes. Then the wreck would be uprighted, lifted to the surface, dewatered and floated. Cruz Script at 19.

As of January 8, 1986 it appeared that the lifting of the HUICHOL would commence imminently. Mollman Script at 20. By telecopy dated January 9, 1986, Tyssen advised interested underwriters, through EII that the target date for completion of the entire salvage job was between 13 January and 18 January, depending on the weather. Exhibit 43. That same day Mollman sent a telex to AAMS providing it with the information contained in the Tyssen telecopy. Exhibit 44.

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The HUICHOL was not raised within the next few days. Unanticipated problems with the slings occurred which impeded the lift. Mollman Script at 20. According to Cruz, the problem occurred because a ship passing through the area during a storm snagged the HUICHOL with its anchor. The vessel shifted and debris lodged under the wreck, making passage of the slings underneath it impossible. Cruz Script at 20. On January 17, 1986, Protexa decided to tunnel under the HUICHOL in order to pass wires. Progress was exceedingly slow. Exhibit 221 at 10000278.

At or about this time Claude Pritchett, a surveyor/adjuster, present on site and representing AAMS, suggested to Protexa that it needed professional help due to the slow progress of the job. Cruz Script at 22. Protexa authorized Tyssen to contact and retain a professional salvage master to assist Protexa. Alex Rynecki, Inc. was hired and it assigned Robert Umbdenstock to assist Protexa in the task of removing the wreck. Umbdenstock arrived in Carmen on January 21, 1986, and, immediately after his arrival, travelled to the site of the wreck. Exhibit 202d at 000914. As the removal effort continued, Protexa remained the effective manager of the removal and Umbdenstock provided salvage consulting service to it. Exhibit 221 at 10000279. Umbdenstock found that the basic salvage plan, the sling and lift method, was conceptually sound. However, he was critical of the diving operation and the lack of effective on-site management. Umbdenstock Script at 4. Umbdenstock made a number of observations and recommendations that were never implemented during his three week stay at the wreck site. His role was limited to an advisory capacity. Umbdenstock Script at 5.

Notwithstanding the difficulties encountered, all of the tunnels had been completed by February 6, 1986. Exhibit 202d at 000919. By February 9, 1986, all lifting slings were in place and

the HUICHOL was lifted 10 meters off the bottom. On the following day, February 10, 1986, the HUICHOL was lifted and suspended in the crane. Body recovery operations commenced but were interrupted due to adverse wind and swell conditions. A decision was made to relocate the HUICHOL to shallow water. On February 11, 1986, the crane vessel TOLTECA, reanchored in 20 meters of water and body recovery operations resumed. Twenty-one bodies were removed from the wreck.

During the body removal, Protexa spent many hours trying to refloat the HUICHOL but was unsuccessful. More bad weather arrived with increasing swells and the HUICHOL was placed back on the sea bottom in shallow water, about 20 meters deep and at a location outside the Pemex oil exploratory zone.[11] Exhibit 221 at 10000285-287.

II. THE DISPUTE

AAMS refuses to pay its 30% of 95% of $9,631,726 which equals $2,745,042. AFIA likewise refuses to pay its 5% share which equals $507,000. Through AAMS' leadership both of these defendants assert that the wreck removal engaged in by Protexa falls outside the coverage provided by the policy, since the HUICHOL's removal was, according to defendants, not compulsory by law. Moreover, defendants assert that even if the HUICHOL's removal was compulsory by law, Protexa failed to act as a prudent uninsured and by its own conduct is precluded from the recovery sought. Protexa counters that the removal was compulsory by law and that at all times it acted as a prudent uninsured. Therefore, Protexa argues, it is entitled to a judgment against each of the defendants.

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11. The sinking of the HUICHOL in shallow water was the result of a successfully negotiated agreement between Protexa and the Carmen Port Captain.

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III. CONCLUSIONS OF LAW

With the sinking of the HUICHOL, accompanied by a substantial loss of its crew, Protexa was faced with a disaster of immense national import. Enormous amounts of pressure from diverse sources all with legitimate concerns, were directed at Protexa. The families of the deceased crew members were clamoring for the remains of their lost loved ones. The oil workers, Mexico's most powerful union, joined in support with the families to raise the wreck to recover the bodies of their comrades. Pemex, upon whom Protexa was economically dependent, demanded that Protexa raise and remove the vessel from their oil exploratory zone. Lastly, as perceived by Uriarte, the Mexican government had issued an order that the vessel be raised and removed from the Pemex exclusive economic zone. Surely Protexa, even as large and sophisticated a company as it was, experienced extreme discomfort from the moral and economic forces that were being exerted in its direction.

Undoubtedly, the sinking of the HUICHOL was a dark day in the history of Protexa's commercial operations. No similar incident of this magnitude had ever befallen it. Prior salvage involvement with the OLMECA and the KICKAPOO were shallow water operations without wreck removal implications. Indeed, none of Protexa's personnel had any deep water wreck removal experience prior to its decision to remove the HUICHOL. Tr. 111 at 7-24, Tr. 112 at 1-6.

Protexa, prior to commencement of its wreck removal operations was aware that the reinsurance underwriters, whether it be the primary or excess level, would honor its claim *only* if the removal was compulsory by law and it acted as a prudent uninsured. The Court will now examine each of these aspects of the

litigation in light of the factual history, the trial testimony and the analytical framework that evolved from a prior court review in response to the parties' cross-motions for summary judgment.

A. *Compulsory By Law*

Each of the parties have cited to the Court a myriad of legal authority that they assert is case dispositive of the compulsory by law issue. For the most part, the statutory authority they cite, except for tht United Nations Convention on the Law of the Sea (the "Law of the Sea"), is identical and referred to in the removal order. Moreover, the interpretation each places on the clear language of these laws is diametrically opposite. Protexa contends that they demonstrate the validity of the removal order. AAMS counters that they are patently invalid on a facial reading and that when reviewed in *para materia* with the Law of the Sea, their invalidity is no longer facial, but real. No Mexican jurisprudence has ever construed these statutes as to their applicability to an offshore wreck such as the HUICHOL, nor has any judicial decision been rendered by a Mexican court that has reviewed the interplay between the statutes cited and the Law of the Sea.

In the Court's August 26, 1988 opinion, it recognized that the act of state doctrine generally precludes United States courts from reviewing acts of foreign governments and that is particularly true in respect to a controversy regarding property allegedly located outside of that state's territorial waters, and whose location is in potential conflict with a provision of a treaty. Opinion at 11.[12] Here,

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12. The act of state doctrine provides that courts in the United States will generally refrain from examining the validity of a foreign state's governmental acts in regard to matters within its own territory. *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1057-58 (3d Cir. 1988), *aff'd*, __ U.S. __, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990).

as in *Progress Marine, Inc. v. Foremost Ins. Co.*, 642 F.2d 816 (5th Cir.1981), *cert. denied*, 454 U.S. 860, 102 S.Ct. 315, 70 L.Ed.2d 158 (1982), the absence of governmental authority to order removal of the wreck, even if true, is not necessarily issue dispositive and is merely one of the factors that this Court must look at in determining whether removal of the HUICHOL was compulsory by law. Because of the Court's prior expression of its understanding of the term "compulsory by law" it will assume, without deciding, that the Port Captain's removal order was valid.

Several courts have explored the words "compulsory by law" in the context of marine insurance policies with varying opinions as to the effect these words should be given. A review of these courts' analysis of such language is therefore in order.

In *Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.*, 461 F.2d 500, 504 (2d Cir.1972), the court construed the term "compulsory of law" to be a "term of art in admiralty law" which specifically required abandonment of the vessel by the owner and the hull underwriter and an express order from a governmental body directing removal. Because in that instance the owner and hull underwriter had not abandoned their vessel nor had a government order directing removal been issued, the court denied recovery under the insurance policy. In the current action, as in *Jocharanne*, there has been neither abandonment nor a removal order.[13]

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13. The Court stated in its August 26, 1988 Opinion that both of the *Jocharanne* criteria, *ie.*, abandonment and a removal order — have been met. Opinion at 13. However, as the Court's Findings of Fact elaborate in detail, Protexa obviously did not abandon the HUICHOL; likewise, the Port Captain's Order does not require wreck removal, *See infra* at 1222. Because the Court did not apply *Jocharanne's* definition of "compulsory by law" in denying summary judgment, *see* August 26, 1988 Opinion at 17, the Court's misstep did not lead to a misdirection of the entire case.

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The Fifth Circuit Court of Appeals has also had the opportunity to examine the meaning of the phrase "compulsory by law" in the context of marine insurance policies. In *Progress Marine,* the court reviewed the authorities relied upon by the *Jocharanne* court, but rejected the Second Circuit's analysis of the phrase "compulsory by law" as "a term of art"; instead, it adopted an interpretation of such phrase that it described as more consonant with the reasonable expectations of the parties. *Progress Marine,* 642 F.2d at 820. Beginning its analysis with a review of some general principles concerning construction of insurance policies, the court in *Progress Marine* noted that "in construing an insurance policy reference must be made to the reasonable expectations of the parties as to the risks and protection against them." *Id.* at 818. Thus, the court concluded that "where removal was reasonably required by law or where failure to remove would have reasonable [sic] exposed an insured to liability imposed by law sufficiently great to justify the expense of removal, then, we believe, such removal could be considered 'compulsory by law' for purposes of recovery." *Id.* at 820.

Likewise, two years later, the Fifth Circuit in *Continental Oil Co. v. Bonanza Corp.,* 706 F.2d 1365, 1369 (5th Cir.1983), construed the words in the phrase "compulsory by law" in their "plain, ordinary, and popular sense." The court, turning to the Random House Dictionary for its analysis, stated:

> The Random House Dictionary (8th ed. 1981) defines 'compulsory' in two different senses. One is 'using compulsion; compelling; constraining.' The other is 'required without exception; mandatory; obligatory.' The first sense betokens that compliance is impelled, perhaps by sanctions The second more closely

> suggest an unavoidable mandate. The policy does not unambiguously adopt either, definition. We must consider not only what is 'compulsory', but also what is meant by compulsion effected by 'law'. *Jocharanne* decided that, as a term of art, the phrase had the second meaning: removal is compulsory by law only when a governmental, or, perhaps, judicial body directs it. Restricting 'compulsion' to the mandate of a governmental agency rather than according it the usual significance of the generalized command of a statute or judicial decision narrows the meaning of the term considerably and, we think, unjustifiably.

Id. at 1369.

The court thereafter determined that removal should not be considered compulsory by law only after "a court has rendered judgment requiring it or when an official has issued a fiat." *Id.* at 1370. Rather, in determining whether removal is legally compelled, the court stated that one must look to the state of affairs as they would appear to a reasonable owner under the circumstances.[14] *Id.*

The Third Circuit in *East Coast Tender Service v. Robert T.*

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14. While the court in *Progress Marine* had adopted a two-part objective/subjective test for the determination of whether removal was in fact compulsory by law, the *Bonanza* court eliminated the subjective inquiry stage and focused solely on what a reasonable assured would have done, not on the thought process of the actual assured or his counsel on a given day. 706 F.2d at 1371.

Winzinger, 759 F.2d 280 (3d Cir.1985), similarly rejected the Second Circuit's analysis in *Jocharanne* and adopted the test previously set forth by the Fifth Circuit in *Progress Marine* and *Continental Oil*. Although there was no government order involved in the *East Coast* action, the court held that a protection and indemnity insurance policy should not be restricted to situations where there was an express order from a governmental body directing removal and found that such a narrow interpretation could lead to inequitable results. 759 F.2d at 286.

Plaintiff has argued previously that the above cases clearly indicate that "the mandate of a government agency, a direct command, or an official's fiat would *ipso facto* constitute legal compulsion." Plaintiff's Motion Brief at 17. Thus, plaintiff submits that because in this instance it was faced with an order from a government official which appeared to be backed with sanctions and/or fines, as well as a requirement that plaintiff repay the Mexican government for its costs of removal if the order was not complied with, removal of the HUICHOL was "compulsory by law," and it is now "legally meaningless for defendants to claim, in hindsight, that the sanctions *may have been* unenforceable if challenged in a Mexican Court." Plaintiff's Motion Brief at 18 (emphasis in original).

In opposition, defendant asserts that the cases which have interpreted the phrase "compulsory by law" have clearly established a balancing test of reasonableness in which three factors — the likelihood of exposure, the sanctions for failure to remove, and the cost of removal — must all be examined in order to determine if removal was, in fact, "compulsory by law." The existence of an order, defendant avers, is but one factor to be considered in the balancing test. And where, as defendant alleges exists herein, the order issued is invalid, the likelihood of exposure

to sanctions for failure to remove should be considered a nullity such that it cannot possibly justify any cost of removal for plaintiffs.

Based upon a careful review of the cases cited above, this Court has adopted a position somewhat in the middle of the parties' viewpoints and concludes that the determination of whether removal of a vessel was "compulsory by law" must be decided by looking to the state of affairs as they would appear to a reasonable owner under the circumstances and examining whether failure to remove a wreck would likely expose such owner to liability imposed by law sufficiently great in amount and probability of occurrence to justify the expense of removal. In other words, in this action, would a reasonable owner faced with the Port Captain's December 17, 1985 Order (the "Order"), determine that failure to remove the HUICHOL would likely expose it to liability imposed by law sufficiently great in amount and probability of occurrence to justify the expense of removal.

This approach differs from plaintiff's version in that the mere existence of the Order does not *ipso facto* make removal compulsory by law. Rather, an examination of the Order must be undertaken to determine if a reasonable owner would think that the Order, if not complied with, would likely expose it to liability sufficiently great to justify removal. If, for example, the Order had merely threatened a fifty dollar fine for non-compliance, it would certainly not justify a removal operation estimated to cost several million dollars.[15]

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15. Note that defendant's assertion that the plaintiffs merely faced a $20,000 sanction for non-compliance with the Order appears to be a matter in dispute. Plaintiffs claim that in addition to the fine, their non-compliance with the order would have exposed them to liability for the Mexican government's cost of removal, a cost factor over which they would have no control.

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Similarly, this Court's approach stands in contrast to defendant's position, since the actual validity or invalidity of the Order is not dispositive. It is the liability which the Order *appears likely to expose one* to which is pertinent to the determination of whether removal was compulsory by law. It is, after all, more probable than not that a reasonable owner faced with that which appears to be a valid removal order threatening substantial penalties and/or fines for noncompliance thereto, would determine that its failure to abide by the terms of such order would likely expose it to significant liability under the law.

1. Protexa's Contentions

Protexa contends that it was presented with a formally drawn document which had the official seal of the Port Captain attached. It was aware that failure to comply with a government order could expose it to the type of sanctions that its counsel Uriarte catalogued. Moreover, it attributed a presumption of validity to the removal order, since a party who is the focal point of such an order is not free to disobey it, especially in view of the regularity that normally attaches to acts of government officials. As Cruz stated, "when the Port Captain says move, you move."

After receipt of the Port Captain's order, Cruz gave a copy of it to Mollman, Tyssen and Uriarte. On December 20, 1985, after Uriarte reviewed it, including the statutes it recited, he advised Protexa's response team that the Order was valid. Additionally, he informally met with the Port Captain for the express purpose of having him either suspend or rescind the order. When this effort failed, Uriarte determined and advised that since the order was valid, no Amparo proceeding was appropriate and it must be complied with. With this narrative history in mind, Protexa

commenced and continued removal operations until the vessel was raised.[16]

2. AAMS' Contentions

Beyond the patent invalidity of the Port Captain's Order, which this Court has already rejected, AAMS submits a host of additional reasons to buttress their argument that the raising of the HUICHOL was not compulsory by law. Rather, AAMS submits, moral and commercial considerations determined Protexa's conduct and ultimate decision to raise the HUICHOL.

The moral and commercial consideration argument is bottomed on the fact that Pemex is Protexa's only maritime construction client. Without Pemex's economic favor, Protexa's marine construction operations would be placed in grave jeopardy. The hard economic reality of that relationship is that Pemex's desire was Protexa's command, despite the fact that the contract between Protexa and Pemex was silent as to wreck removal. Moreover, Pemex is the Mexican government's sole licensee for oil and gas exploration and represents its primary source of hard currency.

The recovery of the lost crew for the solace of their families and to promote good relationships with Protexa's other employees who belonged to Mexico's strongest labor union evokes both moral and commercial motives for a prompt response. Since this occurrence was a national disaster, Protexa wanted to blunt adverse publicity by raising the HUICHOL without delay.

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16. The removal commenced on December 19, 1985 and concluded on February 10, 1986, a period of 53 days.

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Defendants also question the soundness of the legal advice provided to Protexa by Uriarte. They argue that had Protexa been given proper legal advice, it would not have complied with the Port Captain's order. In support of this theory, defendants are very critical of Uriarte. Their criticism begins with the cursory 45 minute review of the removal order and statutes pertaining to the authority and jurisdiction of the Port Captain. The failure to prepare a written opinion and the failure to consult with independent maritime counsel, especially in view of Uriarte's commercial and corporate experience, weighs heavily in their evaluation of his legal unfitness. Furthermore, the informal application of Protexa for suspension or rescission of the Port Captain's order was unprofessional, since Uriarte was uninformed of pertinent information necessary to make a proper presentation. For example Uriarte was unable to present an argument directed to the authority of the Port Captain beyond the 12 mile limit, since he was unaware of it. He had no knowledge of the exact location of the wreck and whether it constituted a true hazard to navigation or a threat to the environmental well being of the area. He was unaware of its proximity to oil drilling platforms and related structures and had no knowledge of the condition of the vessel as it related to its position on the sea bottom. Beyond the information he lacked pertaining to the vessel, he was uninformed as to the plan of removal, cost factors of removal and availability of experienced third-party salvors. When confronted with the Port Captain's demand for immediate removal, he lacked information as to whether the Mexican Navy had the capacity to remove the wreck or the availability of third-party salvors to the Mexican Navy. In essence, Uriarte's visit to the Port Captain and his presentation was in fact no presentation and unworthy of judicial cognizance.

Defendants' criticism of Uriarte persists because of his failure to formally challenge the Port Captain's order through an Amparo

proceeding or by application to a court of competent jurisdiction. Moreover, they contend that the litany of sanctions confided to Protexa by Uriarte were in fact meaningless and an insignificant factor in the course of events that followed. Hence, defendants conclude that the wreck removal that commenced on December 19, 1985 was not compulsory by law. Coupled with the preceding arguments is AAMS' demand for a third-party salvor which Protexa ignored. Had a more reasoned legal opinion been prepared and a third-party salvor consulted, an appropriate presentation could have been made to the Port Captain which would have obviated Protexa's removal of the HUICHOL.

3. The Removal of the HUICHOL Was Not Compulsory by Law

The sinking of the HUICHOL was a peradventure occurrence. The record is barren of any evidence that its sinking resulted from a faulty hull or deficiencies with its maintenance. Moreover, Tyssen's and Umbdenstock's final reports attribute the wreck of the HUICHOL to high winds and swelling seas. Since unstable weather conditions created the loss, an investigation which purportedly sought to examine the hull was initially suspect and ultimately unnecessary. Arguably, the inspection of the hull and the removal of the bodies could have occurred without the necessity of removal. This avenue of approach was not explored.

A natural point for the analysis to commence is the Port Captain's Order. Concededly, the Port Captain occupies a position of importance in the maritime industry and speaks with the force of law. Even a company as large as Protexa does not want to incur the wrath of the Port Captain. In pure economic terms, to offend the Port Captain does not make good sense. On the other hand, Protexa is a dominant force in the maritime construction industry whose

corporate shadow extends beyond the Port Captain and is capable of being seen in Mexico City by the highest levels of the Mexican government.

Uriarte was a reticent legal representative at best. Because of the Christmas holidays, he twice declined to travel to Carmen and finally relented only when promised transportation by the corporate jet.Upon his arrival in Carmen on December 20, 1985, a need for immediate action was evident. Grieving families were assembled awaiting word of their missing loved ones. Protexa wanted to tell them that the wreck would be removed, a factual circumstance that had in fact commenced the preceding day. It was within this emotionallycharged atmosphere that Uriarte reviewed the Port Captain's Order.

Although Uriarte interpreted the Port Captain's Order as a removal order, no phrase in the body of the Order directs wreck removal. Explicitly, the Order directs its attention to cleaning up the area and to the salvaging of the vessel Salvaging does not necessarily mean wreck removal and encompasses recovery activity of something less than wreck removal. Furthermore, the Order does not order wreck removal within 25 days. What the Order does require is the posting of a bond within 25 days.

Uriarte's review of the Order and the applicable statutes contained in the order occurred within the span of 45 minutes. He then concluded the Order was valid and he and other Protexa representatives announced to those assembled that the wreck would be removed. Uriarte had no training in admiralty law and was unfamiliar with the United Nations Convention of the Law of the Sea. He also failed to engage in an effort to seek the counsel of someone who in fact did possess maritime legal experience. At this point in time Protexa anticipated spending a minimum of

$3,785,800 to a maximum of $5,390,592 for wreck removal and relief upon nothing more than an oral opinion from a staff attorney. For Protexa to proceed in this fashion is not only extraordinary but incredible and casts serious doubt on the exercise of its corporate judgment.

To provide a contrast to Protexa's handling of the Port Captain's Order, the defendants produced Walter Cardwell, formerly general counsel of SEDCO, Inc. Through his script he indicated that he had experienced a situation similar to that confronted by Protexa and Uriarte. In his direct testimony through script, he stated:

> I have been in the position of a ship owner faced, in the case of the drawworks of the SEDCO 135 C vessel, with a wreck removal order issued by the Port Captain of Ciudad del Carmen. In that situation, after consulting with independent counsel and weighing the costs associated with its various options, SEDCO decided not to comply with the wreck removal order issued by the Port Captain. To the best of my knowledge, the wrecked drawworks of the SEDCO 135 C remain to this day on the bottom of the sea in the same oil field as the original location of the wreck of the HUICHOL H and the removal order hafi never been formally rescinded.

Cardwell Script at 2.

Paragraph 4 of Cardwell's testimony is noteworthy of repeating since it places in juxtaposition what Protexa and its

counsel did and what a reasonable shipowner, confronted with the same or similar situation should have done. Moreover, the Court found Cardwell to be a very credible witness. His comments in paragraph 4 are as follows:

> a. Protexa did not approach the Order in a manner consistent with a reasonable balancing of the costs of removal, the avenues of challenge available to Protexa and the cost of non-compliance with the Order. Specifically, when faced with such an order, a reasonable shipowner should determine the lowest reasonable cost of removal and balance it, against the costs which can be expected to flow from possible non-compliance with the Order. The record reflects that Protexa did not seek out the advice of independent legal counsel regarding the validity and enforceability of the Order and any sanctions which might follow non-compliance. Protexa also did not secure the advice of professional deep-sea salvage consultants, nor did it engage in the customary practice of securing competitive bids from professional salvors to determine the reasonable cost of removal of the wreck.
>
> b. However, based on the information available to Protexa at the time that the Order was issued, the balance of costs and benefits of compliance weighed heavily against compliance with the Order as it was then issued. First, the costs associated with non-compliance were not great: The Order is not

even a wreck removal order per se, in that it only orders the posting of a bond, and not removal of the wreck itself. Even if it were an order of removal, it appears to be invalid on its face in that even to a non-Mexican lawyer, the statutes cited do not appear to have any application beyond territorial waters. Even beyond that, the Mexican statutory scheme cited does not allow for any sanction against Protexa for non-compliance other than abandonment of the vessel and the possibility of a legal proceeding for the cost of removal itself. Since the cost of raising the vessel exceeded her value, abandonment was obviously no sanction at all.

c. Second, as calculated by Protexa at the time, the costs of removal were far greater than the reasonably foreseeable cost of non-compliance with the Order. Protexa projected that the minimum expected cost for removal at the time was in excess of $3,000,000. If the worst that could happen as a result of non-compliance would be for the Mexican government to assess the cost of removal, Protexa would have had the right to litigate that the charge assessed by the government be the lowest reasonable cost of removal. Protexa's maximum liability would then have been for the roughly $1 million figure that a professional salvor would have charged (referring to the bid that Smit eventually made). Even looking to the extremely

> conservative figures calculated by Mr. Umbdenstock (without benefit of competitive bids), the highest cost of noncompliance would have been $2.9 million.[17]
>
> d. Thus, I conclude that Protexa acted unreasonably in hastily commencing wreck removal operations without the benefit of professional assistance in disregard of the weighing of costs associated with compliance and non-compliance with the Order.

Cardwell concluded his direct testimony with his opinion that the removal of the HUICHOL wreck was not compulsory by law.

Uriarte's visit to the Port Captain's office was a *pro forma* appearance but of little substance. He was so ill-prepared and uninformed that his application was doomed to failure even before it was presented. For example, he was unaware of whether the Mexican government had any means at its disposal to remove the HUICHOL. Tr. 322 at 10. He did not know what a third-party salvor would charge to remove the wreck. Tr. 322 at 21. No one at Protexa had told him what it was going to cost Protexa to remove the wreck. Tr. 323 at 2. He was unaware that three miles separated the HUICHOL from a Pemex platform or related structure. Tr. 329 at 10. In terms of sanctions, he admitted that forfeiture of the HUICHOL to the Mexican government was not a sanction that required the Order to be obeyed. Tr. 329 at 24. Protexa further stipulated that the threat of fines was not the primary motivating factor for the removal of the wreck. Tr. 331-24 to 332-1. Without

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17. The factual predicate for Cardwell's information as to the reasonable cost of removal is found in Umbdenstock's Script at 9.

further belaboring this opinion with Uriarte's cross-examination, it is important to note that he did not make a technical presentation to the Port Captain pertaining to the wreck constituting a hazard to navigation. Tr. 335 and 6. In fact, Uriarte agreed with the Port Captain that the wreck was a hazard to navigation. Tr. 335 at 3. The commercial and moral implications that AAMS asserts motivated Protexa to remove the wreck are documented in Uriarte's cross-examination. Tr. 336-17 to 337-11.

AAMS proffered the testimony of David Pockett, who has 15 years experience as a marine consultant to various interests involved in marine casualties. He has been involved on numerous occasions in wreck removal and salvage operations throughout the world, including Mexico, on behalf of both ship owners and insurance interests. The Court found Pockett, like Cardwell, to be an exceedingly credible witness. His findings as set forth in the subparagraphs of paragraph 5 of his script bear repetition. as follows:

> a. Protexa did not approach the removal Order in a prudent and realistic manner consistent with a reasonable balancing of the costs of removal, the avenues of challenge available to Protexa and the consequences of non-compliance with the Order. Generally, it has been my experience throughout the world that government marine officials of democratic nations such as Mexico keep an open mind to well-reasoned presentations by shipowners, prepared in connection with advice from professional marine consultants and other professionals, that request retraction or modification of wreck removal orders. Protexa

could have and, in discharging its duties as a prudent uninsured, should have immediately upon receipt of the Order retained a professional salvage consultant to assist in the preparation of such a presentation.

b. Based on the information available to Protexa at the time that the Order was issued, sufficient data could have been presented to show that in fact the wreck of the HUICHOL II did not have to be removed. Thus, Protexa should have met with the Mexican marine authorities and demonstrated that the wreck of the HUICHOL II, as it lay immediately after its sinking, presented no hazard to navigation, the marine environment or to offshore activity in the Pemex oil field. Such a request, when accompanied by a well-prepared presentation by professional marine consultants, would have at least resulted in the government recognizing the need to allow Protexa sufficient time to secure bids from professional salvors and very well may have resulted in a complete retraction of the Order. Instead, the record reflects that Protexa at most, engaged in a half-hearted informal challenge to the Order that was not based on any proper technical analysis of the situation of the wreck or the costs to be expected in its removal.

c. In other instances in which I have been involved where wreck removal orders have been issued, it has been my experience that,

where a ship owner undertakes a professionally-supported analysis of the technical aspects of wreck removal and engages the government authorities in concerted dialogue about the practical aspects of removal, removal has been avoided without economic or legal consequence to the owners [or] their insurers.

d. Protexa did not approach the technical task of wreck removal in a reasonable fashion. Although Protexa is a competent offshore construction firm, salvage is a service it neither offers nor is it a service it boasts of being capable of performing. Indeed, there are no salvage companies of repute in Mexico. In such a case immediate contact with professional international salvage firms, such as Smit International, Wiljsmuller and Bugsier, is a minimum step necessary to ascertain the potential costs of removal. Such salvage firms are always willing to make a survey of the casualty and submit a bid at no cost. In my opinion, a professional salvor would have completed removal of the HUICHOL II within 30 days.

e. The only way to determine the commercially reasonable cost of a deepsea removal job of the obvious difficulty posed by the wreck of the HUICHOL II is to invite bids by two or more of the universally-recognized professional salvage firms. Thus it was entirely

unreasonable for Protexa to commence wreck removal operations without taking such a step.

f. Furthermore, based on my experience in deep-sea salvage and wreck removal jobs worldwide, I conclude that the cost figures quoted by Protexa for undertaking the removal of the wreck of the HUICHOL II were also far above any reasonable amount. Even its initial lump-sum bid of roughly $3,000,000 was exorbitant. Beyond that, its "day rate" of almost $225,000 per day was far too high. Finally, its final request for over $10,000,000 is beyond any reasonable charge for the removal by a factor of ten. I believe that $1 million would have been a reasonable charge, on a lump sum, no-cure, no-pay basis, for removal of the wreck of the HUICHOL II.

g. The wreck of the HUICHOL II posed no hazard to navigation or the marine environment as it lay immediately after it sank: Given its depth and the bottom condition, the wreck would not have moved on the bottom, it was in an area marked "Anchorage Prohibited" on nautical charts and it did not have significant amounts of potential pollutants aboard.

Protexa's failure to engage in the type of conduct prescribed by Pockett was unreasonable at the very best and irresponsible at the very least.

Appendix E

The sanctions that Uriarte recounted for the Protexa response team, *see supra* at 1215-1216, were in fact meaningless and lacked persuasive value. Removal of the HUICHOL by the Mexican government or through a third-party salvor in light of the Protexa-estimated cost of removal was no sanction. The potential for catastrophic liability to third-parties if the wreck were to move within the oil field was remote, particularly in view of the three mile distance between the wreck and any Pemex installation. In *Bonanza,* the insured, Conoco, removed a wreck which had sunk off the coast of Texas in the midst of an offshore oil field, claiming that if the wreck moved in a storm and damaged a pipeline Conoco could face an immense adverse potential damage award. 706 F.2d at 1372-1373. Yet, even though the cost of removal was relatively small in comparison to the potential damage award, the court found the removal of the vessel was not compulsory by law in that Conoco's potential liability was too remote. *Id.* The court held that for removal to be compulsory by law there must be a present and unconditional duty. In particular, the court stated that "[t]he possibility that, by an extension of maritime law not yet decreed, Conoco might be held liable in the future should [the vessel] be dislodged from the mud and propelled against other structures is not such a legal obligation." *Id.* at 1373. Accordingly, the Court does not view Protexa's potential liability for damage as an appropriate sanction to be factored into the compulsory by law equation.

The sanctions of fines and the risk of loss of the bond amounted in total to approximately $50,000. They could not in this factual scenario, either individually or cumulatively, amount to a sanction.

Lastly, Uriarte directed his legal compass toward the grave consequences Protexa could experience with the Mexican

government and Pemex if Protexa were to disobey an obviously valid order. In his cross-examination, Mollman acknowledged that commercial pressure would not satisfy the compulsory by law standard of the policy. Tr. 176 at 6 to 177-10.

The Court has exhaustively reviewed the evidence presented and without hesitation concludes that Protexa has not satisfied the analytical framework that defines the concept of compulsory by law. Protexa, looking at the state of affairs at or near the sinking of the HUICHOL, responded out of moral and commercial necessity. Whether humanitarian instincts predominated in Protexa's thinking is not for this Court to speculate. The commercial aspects of its thought process are self-evident truths that do not require further explication.

Protexa did not act as a reasonable owner under the circumstances. Its failure to remove the HUICHOL was not likely to expose it to liability imposed by law sufficiently great in amount and probability of occurrence to justify the expense of removal. Accordingly, the Court determines that the wreck removal of the HUICHOL was not compulsory by law.

B. *Prudent Uninsured*

Protexa knew that the policy of insurance required it to act as a prudent uninsured. Exhibit 258 at 40000591. By the terms of the policy in its pertinent part, it provided "that in respect of any occurrence likely to give rise to a claim under this policy, the Assured are obligated to and shall take steps to protect their (and/or the Assurer's) interests as would reasonably be taken in the absence of this or similar insurance." An insured has a duty to exercise the care of a prudent, uninsured owner with respect to the insured property. *See generally Blasser Bros. v. Northern Pan-*

Appendix E

American Line, 628 F.2d 376, 386 (5th Cir.1980) (duty to exercise care of prudent, uninsured owner under sue and labor clause). Not only was Protexa charged with knowledge of the language of the policy but had been warned by both Mollman. Exhibit 266, and by Guerrero, Exhibit 24, of this obligation.

When Protexa acted as its own salvor it failed to act as a prudent uninsured. From the deposition testimony of Cruz and Uriarte, it is abundantly clear that Protexa had no experience in deep water wreck removal operations. Protexa was a maritime construction company and not a wreck removal salvor. Therefore, when Mollman contacted the primary level reinsurers and communicated to them Protexa's offer to remove the HUICHOL, he did so under the apprehension that Protexa possessed the expertise to handle the wreck removal. Mollman Script at 11. The misinformation was compounded when Mollman further advised those very same underwriters that immediate removal was required to minimize expenses because the HUICHOL was sinking in the mud. At the time Mollman was relying on Tyssen's evaluation which Mollman assumed was communicated to Tyssen directly by Protexa's divers who had surveyed the sea bottom in aid of the removal plan's preparation. Mollman Script at 7-8. However, during his depositions, Tyssen conceded that he had never spoken to the divers. Dep. 178 at 20. Indeed, it was Protexa's conclusion that the vessel was sinking in the mud and not Tyssen's independent conclusion. Dep. 180 at 7.

The notice to the underwriters left much to be desired. None of the excess level underwriters had been contacted when Mollman told Protexa that the underwriters had approved Protexa as a salvor. Tyssen Dep. 310 at 3. Also see Tyssen Dep. 200 at 3, 61 at 14 and 39 at 13. In his script at 13, Mollman points to Tyssen as the one who told Cruz that the underwriters had approved Protexa to do the

job and that Protexa should start the job immediately. The irony of receiving the consent of only the primary level underwriters is striking in view of their $2,500,000 limit of liability and the potential that the hull and cargo loss would consume most of the primary layer of insurance. Surely, if Protexa was looking for approval and acting prudently, it would have demanded to see a writing that would indicate both Lloyds' and AAMS' approval.

AAMS never did accept Protexa as its own salvor nor did it agree to the day rate of $224,000. In fact, AAMS sent a telex on December 20, 1985 with the request that a third-party salvor, as much as possible, get involved in the removal of the vessel. On December 23, 1985 AAMS, in a telex to Tyssen, sought information as to whether there had been a mandate from a regulatory body requiring Protexa to remove the HUICHOL from its present location. Exhibit 34. Despite AAMS's request, Protexa proceeded to act as its own salvor. On January 9, 1986 AAMS received a telex from Mollman which was a repeat of Tyssen's report that the wreck removal estimate was $7,300,000 and that the target date for completion of the entire salvage job is between January 13-18. Exhibit 44. In a series of telexes transmitted between January 13 and January 21, 1986, AAMS voiced its concerns as to the reasonable expense of the wreck removal. Exhibits 46, 52 and 57. Meanwhile, Pritchett, who was AAMS's surveyor at the scene, on January 17, 1986, recommended that the salvage operation be placed out for competitive bids. Exhibit 51.

While Protexa was engaged in the salvage of the HUICHOL and AAMS was cast in the role of the "sore loser," a world-renowned and acknowledged third-party salvor, Smit International, sought to become involved in the wreck removal of the HUICHOL. Fredericks Script at 2. Also see Exhibit 333. Smit also contacted RJA and Mollman to offer to perform the removal of

the wreck. Fredericks Script at 3. Smit, however, was not invited to bid until late January of 1986 and at that time offered to perform the wreck removal for $1.125 million on a lump sum, no cure, no pay basis.[18] Exhibit 97.

On January 20, 1986 the wreck removal of the HUICHOL was foundering to say the least. Another experienced salvor, Alex Rynecki, Inc., was contacted by Tyssen and retained by Protexa as its salvage consultant. Rynecki assigned Robert Umbdenstock to the project. After his arrival on the site on January 21, 1986, Umbdenstock advised Cruz that the only way to determine the reasonable cost for the wreck removal operation would be to secure competitive bids. Umbdenstock estimated that a commercial salvor would bid between $1.1 million and $2.9 million dollars. Exhibits 69, 290 and 291.

Although Umbdenstock agreed that Protexa's removal plan was conceptually sound, he found its execution was inadequate. In paragraph 8 of his script he criticized the lack of experienced salvage divers and their use of surface-supplied air. In paragraph 9, he commented on the lack of effective on-site management and the absence of experienced salvage professionals involved in the wreck removal effort. Furthermore, despite the fact that he made recommendations to Protexa as their salvage consultant, Protexa failed to implement any of these recommendations. Umbdenstock Script at paragraph 11.

Umbdenstock concluded that Protexa acted unreasonably in hastily commencing wreck removal operations without the benefit of professional assistance in determining the difficulties involved

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18. A lump sum, no cure, no pay basis means that the salvor is paid only on the condition that it successfully removes the wreck.

and the commercially reasonable cost of such an operation. His paragraph 13 conclusions, subparagraphs (a)-(h) are particularly damning to Protexa's conduct. Subparagraph (f) is representative of his negative commentary. In it he stated as follows:

> As carried out by Protexa, the wreck removal presented a threat to the safety and lives of the divers involved. Without adequate, experienced on-site management, the Protexa divers were forced to undertake the task of recovering the wreck of the HUICHOL II in an inefficient manner. The diving techniques employed by Protexa were inappropriate and needlessly risked the divers' safety as well. The divers working at extreme depths on surface-supplied air were able to spend very little time per dive on the bottom which resulted in inefficient and duplicative tunneling efforts. On many occasions, I observed that the diving operations resulted in little or no progress being accomplished for long periods of time. Protexa's approach to the wreck removal operation showed a lack of experience in this sort of operation.

Umbdenstock was an experienced marine salvage consultant and a credible witness before the court.

Even more demonstrative in his criticism is Richard Fredericks, who currently is employed by a non-profit, nationwide marine oil spill response facility. He spent more than 20 years in the marine salvage field. At the time that the HUICHOL sank, he was vice president of Smit Salvage, Inc. Smit, at that time, was

engaged in the wreck removal of the TAURO DEL GOLFO, a craft of about the same size as the HUICHOL and which had sunk only 13 miles away. Fredericks Script at 8. Smit raised the TAURO DEL GOLFO for the no cure, no pay price of $580,000. In subparagraphs (a)-(g) of paragraph 12, he states as follows:

> a. Protexa did not approach the removal of the wreck of the HUICHOL II in a reasonable manner. A vessel of the size of the HUICHOL II lying in over 130 feet of water in an inverted position in exposed waters during a period when inclement weather can be expected presents a wreck removal job to be undertaken only by experienced, professional salvors. From both cost and safety viewpoints, such a job should not be undertaken by a firm whose experience is limited to offshore oilfield construction.
>
> b. The physical situation of the wreck of the HUICHOL II immediately after it sank should have been assessed by professional salvors or salvage consultants. Without supervision by experienced salvors, the oilfield construction divers employed by Protexa to survey the wreck cannot be counted on to accurately observe and report on the condition of the wreck. Thus, I have little confidence in the accuracy of Protexa's assessment that the vessel was 'rapidly filling with mud' immediately after it sank. Smit or any other professional salvor would have been willing to immediately conduct a

professionally-supervised diving survey of the wreck of the HUICHOL II at any time. Such a survey could have been completed within 48 hours at any time after the HUICHOL II sank.

c. Even if the vessel were 'rapidly filling with mud' after it sank, professional salvors would have been able to raise the wreck of the HUICHOL II in a much more economical fashion than Protexa claims to have done.

d. Protexa carried out the removal of the wreck of the HUICHOL II in a completely unprofessional manner: the wrong equipment was used by the wrong people in the wrong way. As is set out above, Protexa's large crane-ship TOLTECA was not needed for the HUICHOL job. In the hands of professional salvors, a smaller crane, such as Smit's TAK LIFT I could have done the job safely. As carried out by Protexa, the wreck removal presented a threat to the safety and lives of the divers involved. Without adequate, experienced management, the Protexa divers were forced to undertake the emotionally harrowing task of attempting the recovery of the bodies of their own fellow workers in an inefficient manner that needlessly risked their lives. With proper foresight, the dangerous and inefficient tunneling operation which took up most of the time during which Protexa worked on the job could have been avoided: the wreck could have and should have been raised in an

inverted position with the aid of compressed air. Even assuming that the wreck had to be uprighted on the bottom prior to lifting, more effective means could have been employed to do so. Rather than uprighting the vessel and then passing lifting straps beneath her, the vessel could have been uprighted onto the straps which were to be used. Although Protexa apparently attempted to do this without success, with more planning it could have been done without the need for the subsequent tunneling operation. Finally, the diving techniques employed by Protexa were inadequate as well as unsafe. Without effective management, the divers working at extreme depths on surface-supplied air were able to spend very little time working on the bottom and certainly engaged in inefficient and duplicative effort. All in all, Protexa's approach to the problem was unsophisticated and showed a complete lack of experience in this sort of operation.

e. The amount of money claimed by Protexa for performing the wreck removal is far higher than the figure which would have been charged by a professional salvor. Under no circumstances would a professional salvor have charged the over $10,000,000 claimed by Protexa. In my experience, Smit's bid of $1.125 million is a reasonable charge for a wreck removal such as that of the HUICHOL II. In fact, if Smit had been retained to remove

the HUICHOL II as it lay when it originally sank, a charge closer to the $580,000 charged in the case of the TAURO wreck removal would have been more likely.

f. The wreck of the HUICHOL II posed no hazard to navigation or the marine environment as it lay immediately after it sank: Given its depth and the bottom condition, the wreck would not have moved on the bottom, it was in an area marked 'Anchorage Prohibited' on nautical charts and it did not have significant amounts of potential pollutants aboard.

g. Thus, I conclude that Protexa acted unreasonably in hastily commencing wreck removal operations without the benefit of professional assistance in determining the difficulties involved and the commercially reasonable cost of such an operation. Beyond that, the operation was carried out in a dangerous and unprofessional manner and took far longer than necessary at a cost far in excess of what the market for such services was at the time.

The testimony of Umbdenstock and Fredericks remains uncontroverted. Neither Mollman, Tyssen or Cruz possessed any marine salvage expertise. No Protexa employee testified to the manner in which the removal plan was implemented. Moreover, Mollman and Tyssen operated under the mistaken premise that Protexa was a qualified salvor, since the operation was merely a

lifting and diving operation. The Court has no doubt that Protexa lacked the expertise and oversight requisite to the HUICHOL's removal.

A prudent uninsured would have immediately sought the services of a third-party salvor, and if none were available, would have sought an extension of time from the Port Captain. A snippet of candor from Protexa about its lack of expertise in a deep water wreck removal also would have been far more prudent than the course of action it pursued. Clearly, Protexa did not engage in conduct which tended to prevent or minimize AMMS's loss. Protexa did not act as a prudent uninsured.

IV. CONCLUSION

Because the wreck removal of the HUICHOL was not compulsory by law and because Protexa failed to act as a prudent uninsured, judgment shall be entered in favor of the defendants. Either of these grounds is sufficient to mandate a judgment in favor of the defendants.

APPENDIX F — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED AUGUST 26, 1988

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No.
86-4212

GRUPPO PROTEXA, S.A., et al.,

Plaintiffs,

v.

ALL AMERICAN MARINE SLIP, et al.,

Defendants.

OPINION AND ORDER

APPEARANCES:

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Appendix F

WOLIN, District Judge

The underlying action stems from a dispute between the parties over an insurance claim made by plaintiffs, owners of a vessel known as the HUICHOL II, which sank during a violent storm off the coast of Mexico on December 14, 1985. Plaintiffs raised and removed the vessel from the bottom of the ocean on February 10, 1986. Thereafter, plaintiffs sought to recover the cost of such removal from defendants and various other insurers under a standard protection and indemnity section of their insurance policy which covered expenses which plaintiffs "shall have become liable to pay and shall pay . . . on account of . . . removal of the wreck of the vessel . . . when such removal is compulsory by law." Despite numerous requests by the plaintiffs, defendants have refused to pay plaintiffs' claim asserting that the removal of the HUICHOL II was not "compulsory by law". Having carefully reviewed the arguments of counsel and based upon the reasoning set forth below, this Court denies both plaintiffs' motion for summary judgment and defendants' cross-motion for summary judgment. Furthermore, defendants' motion to dismiss on the basis of *forum non conveniens* is hereby dismissed.

BACKGROUND

On December 14, 1985 the HUICHOL II, a diving support vessel, sank during a violent storm off the coast of Mexico in the Bay of Campeche. Twenty-eight Mexican seamen on board the ship died in the wreckage.

The vessel, which was owned by plaintiffs, had been insured through plaintiffs' broker, Energy Insurance International (EII) of Houston, Texas. The direct insurance was underwritten by four Mexican insurance companies who thereafter reinsured the risks

with All American Marine Slip (AAMS) and various other underwriters. However, the reinsurance policy currently at issue was negotiated directly between EII on behalf of plaintiff Gruppo Protexa and AAMS.

The insurance policy contained a standard wreck removal provision which covered expenses the insureds "shall have become liable to pay and shall pay . . . on account of . . . removal of the wreck of the vessel . . . when such removal is compulsory by law." In addition, the policy required the assureds to "take steps to protect their (and/or the assurer's) interests as would reasonably be taken in the absence of this or similar insurance."

On December 15, 1985, one day after the sinking of the HUICHOL II, plaintiffs notified EII of the incident. EII, acting as a liaison between the underwriters and plaintiffs, called in Rush Johnson Associates (Rush Johnson), a worldwide firm of marine surveyors and adjusters, to survey the damage, adjust the loss and prepare a written report for the underwriters. Rush Johnson appointed Theo Tysen, its Vice-President in charge of the marine department, to handle the claim. Tysen arrived at the scene of the casualty on December 16, 1985.

On December 16, 1985, EII, on behalf of the plaintiffs, notified all underwriters on the policy, including AAMS, of the sinking of the HUICHOL II. EII also informed the underwriter that Rush Johnson Associates had been notified of the sinking and had sent Tysen to the scene.

Meanwhile, in a written order dated December 17, 1985 (the Order), the Mexican Port Captain for Ciudad del Carmen and the offshore port of Cayo Arcas required plaintiffs to post a bond "to guarantee the cleaning up of the area and the salvaging of said

vessel." All underwriters, including AAMS, were notified of the Order by EII. Plaintiffs claim this Order also required them to raise and remove the HUICHOL II within twenty-five (25) days or face sanctions.

On December 20, 1985, defendants, along with the other underwriters, were advised of plaintiffs understanding of the Order and notified that plaintiffs anticipated undertaking the removal of the wreck themselves. Plaintiffs presented the underwriters with two alternatives regarding costs of removal: (1) a fixed lump sum bid to remove the wreck for $3,785,800; or (2) a daily rate, within a 24-day estimate, of approximately $5.4 million. Despite the recommendation of Rush Johnson that the underwriters choose the fixed sum option, several of the underwriters chose not to accept plaintiffs fixed-sum proposal. Defendants did not specifically choose either option; instead they responded by advising that all necessary steps should be taken to minimize the loss. In addition, defendants expressed their desire to have a third-party salvor involved, as much as possible, in the removal of the wreck. However, Rush Johnson investigated the availability of other vessels for the removal operation at the time the removal plan was being conceived and concluded that only plaintiffs' vessels were of sufficient size and proximity to undertake the removal in an expeditious, efficient manner.

On or about December 23, 1985, defendants made their first inquiry to plaintiffs regarding the issue of a removal mandate from a regulatory body in Mexico. Thereafter, on January 13, 1986,[1] defendants specifically requested a copy of the Port Captain's Order from EII. On January 21, 1986 AAMS, prior to having

1. During the period between December 23, 1985 and January 13, 1986, plaintiffs claim that no correspondence or communication was received from defendants and that as a result, removal operations had begun on the HUICHOL II.

received their copy of the Order, suggested that plaintiffs get a legal opinion or conduct legal research respecting the validity of the Port Captain's Order. AAMS thereafter received its copy of the Port Captain's Order on January 27, 1986.

On or about January 29, 1986 plaintiffs requested an opinion regarding the Order's validity from its corporate legal department.[2] This opinion supported Rush Johnson's and plaintiffs' belief that the Order was valid and required the plaintiffs to remove the vessel. Yet, at the same time, AAMS had received a preliminary opinion from their own Mexican counsel to the effect that the Order may have been issued without proper authority. While AAMS immediately notified plaintiffs of the nature of this report,[3] they did not demand or request plaintiffs to stop the removal operation or refuse to obey the Order.

The vessel was finally raised from the bottom of the sea on February 10, 1986. The wreck originally was to be resunk at a deep-water location, yet due to bad weather the Port Captain approved a deposit of the vessel at a different spot much closer to the port than the original wreck site.

After the removal was completed, Rush Johnson prepared its final proof of loss and forwarded copies to all underwriters. As part of this final report, Rush Johnson again reviewed the authority of the Mexican government to order removal and was convinced the

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2. Plaintiffs also claim they requested a legal opinion from an independent Mexican law firm. However, defendants assert that this "outside" opinion was not obtained until May 29, 1986.

3. Note, however, that a copy of this legal opinion has not been provided to the plaintiffs or to this Court. Defendants' counsel represented at oral argument that a copy of the opinion had not been disclosed on the basis of attorney work-privilege.

Order was valid and had required the plaintiffs to remove the wreck.

Following an evaluation of Rush Johnson's final report and proof of loss, defendants requested additional documentation from plaintiffs supporting the Port Captain's authority and jurisdiction. Plaintiffs received and sent to defendants two documents from the Mexican government confirming the validity of the Order. The first document was a letter from the Port Captain dated July 1, 1986 in which he set forth both the factual and legal basis for his decision. The second letter forwarded to AAMS was from the Director General of the Navigation Division of the Merchant Marine which supported the Port Captain's jurisdiction.

On July 22, 1986, the parties held a meeting at the Houston, Texas offices of EII, in an attempt to resolve the issue of the authority of the Port Captain. Plaintiffs claim that they left this meeting with the belief that AAMS had agreed that the Port Captain had authority to order removal of the vessel. Yet, on August 8, 1986, defendants denied plaintiffs' claim on the basis of the Port Captain's alleged lack of authority to order removal.

Thereafter, plaintiffs made a final attempt to resolve the issue of the Port Captain's authority by sending AAMS a letter dated September 13, 1986 from the Director General of the Merchant Marine which again set forth the jurisdiction and authority of the Port Captain, as well as the legality of his action. That letter states, in pertinent part:

> According to the file, it is clear that the Port Captain of Cd. del Carmen, Campeche, had ground to intervene [citations omitted].

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* * *

It is important to point out that article 86 of the Law of Navigation and Maritime Commerce in force, gives the Port Captain sufficient attribution to order removal of the wreck when at his judgment, it troubles the general waterways of communication.

Concerning this matter the order from the Port Captain is completely justified by the following reasons among others:

a) There is a great number of gas and oil pipelines, as well as drilling platforms and other oil installations in the area in which the B/M "Huichol" sank.

b) There is a significant traffic in said area, particularly of ships performing repair and maintenance works in the platforms, pipelines and other installations, so besides navigation, it is performed diving operations, welding, removal of pieces etc.; these activities are been made in the surface as well as inside and in the bottom of the sea.

Due to the foregoing this General Direction of Merchant Marine confirms the legal obligation of Condux, S.A. de C.V. to rescue and remove the ship B/M "Huichol" derived from the order No. CP-3312-23-3350 dated December 17, 1985, issued by the Port Captainships of Cd. del Carmen, Campeche.

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> According to article 262 of the Law of General Ways of Communication, authorization is given to the Port Captain to intervene in maritime accidents, as well as to perform assistance to the federal office of the government attorney, for which reasons he must integrate an investigation as wide as possible, in particular in this case in which several tens of lives were lost; thus, the removal in part was due because of the investigation of the accident itself, besides having been considered necessary for the reasons of heavy traffic and activities that are given in this area and the immediate danger that said wreck would bring for the navigation and the activities made in this area. Moreover, if the Port Captain order had not been followed, said authority would have proceeded to remove the ship under his own authority, requiring the owner of the ship the payment of the corresponding costs, if the owner refused to make such payment . . . this, independently from the penalties that may proceed for the noncompliance of the order.

Defendants, however, continue to dispute the legality of the order and the authority of the Port Captain. As a result, they have refused to pay the plaintiffs under the policy claiming that the removal of the HUICHOL II was not "compulsory by law."

DISCUSSION

Plaintiffs have filed a motion for summary judgment, arguing that the Port Captain's Order to remove the wreck of the

HUICHOL II rendered the removal "compulsory by law," or alternatively, that the "act of state" doctrine[4] precludes AAMS from challenging the validity of the Order. AAMS, in return, has filed a cross-motion for summary judgment, contending that the Port Captain's Order is patently invalid and that the "act of state" doctrine is clearly inapplicable to this action.

In order to prevail on a motion for summary judgment, the moving party must establish that "there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553 (1986). Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356 (1986). In particular, the opposing party is required to set forth specific facts which show that a genuine issue for trial exists and may not rest upon the mere allegations or denials of its pleadings. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). Moreover, in deciding a motion for summary judgment, the facts must be viewed in the light most favorable to

4. The Act of State Doctrine provides that in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state or property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there. ALI Restatement of Foreign Relations Law of the United States (Revised), Part IV, Sec. 469.

the non-moving party and any reasonable doubt as to the existence of a genuine issue of fact must be resolved against the moving party. *Continental Ins. Co. v. Bodice*, 682 F.2d 436 (3d Cir. 1982). With these considerations in mind, this Court examines the parties' current contentions.

Plaintiffs have moved for summary judgment as to defendants' liability under the insurance policy at issue, asserting that pursuant to the Port Captain's Order, removal was reasonably justified under the law and therefore "compulsory by law" under the insurance policy. Moreover, plaintiffs contend that this Court is precluded from examining the validity of the Port Captain's Order in light of the "act of state" doctrine. For these two reasons plaintiffs argue that whether or not the Order was "technically valid", they are entitled to summary judgment.

Defendants oppose plaintiffs' motion for summary judgment on several grounds. First, defendants insist that genuine issues of material fact exist as to the contents of various alleged oral modifications of the Order and in relation to plaintiffs' actions as "prudent uninsureds." Second, defendants contend that because it must be shown that removal was "reasonable" in view of the potential exposure under the Order, the potential sanctions thereunder and the costs attendant thereto, this matter is not appropriate for summary adjudication. Third, due to the "facial invalidity" of the Order, defendants assert that not only is summary judgment for the plaintiffs inappropriate, but that such should be granted in favor of defendants. Fourth, defendants urge this Court not to view the "act of state" doctrine as a bar to this Court's examination of the validity of the Order. And, finally, should this Court conclude that it is barred by the act of state doctrine from reviewing the Order, defendants seek a dismissal of this action on grounds of *forum non conveniens*.

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Having almost drowned in the myriad of arguments proposed by counsel concerning such foggy areas as the "act of state" doctrine, which generally precludes United States courts from reviewing acts of foreign governments, but which has not yet been held applicable to acts of a foreign government in respect to property outside that state's territory or to acts which allegedly violate a provision of a treaty or other unambiguous agreement;[5] and the Restatement of Foreign Relations Law of the United States concerning the United Nations Law of the Sea Convention, in particular the concept of an exclusive economic zone, which to some degree has been accepted, although not formally adopted, by the United States;[6] this Court has finally raised its head above the water and concludes that such matters need not be addressed for purposes of the motions currently before it. Indeed, based upon the reasoning set forth below this Court finds issues such as whether the Court has the authority to review the validity of the Port Captain's Order and whether such Order is in fact valid are not issues which are dispositive of these motions. *See e.g. Progress Marine, Inc. v. Foremost Ins. Co.*, 642 F.2d 816 (5th Cir. 1981) *cert denied*, 451 U.S. 860, 102 S.Ct. 315, 70 L.Ed.2d 158 (1982) (district court's finding that no governmental authority was empowered to order removal, even if true, was not necessarily dispositive of the case.) The real task the parties present to the Court is a relatively straightforward one; the determination of whether the removal of the HUICHOL II by the plaintiffs was in fact "compulsory by law" as those words were used in the insurance policy issued by defendants. Because this Court

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5. *See* ALI Restatement of Foreign Relations Law of the United States (Revised), Part IV, Sec. 469, Comment (b).

6. *See* ALI Restatement of Foreign Relations Law of the United States (Revised), Part V, Introductory Note; *also see The Official Text of the United Nations Convention on the Law of the Sea*, Part V (1983).

concludes that the determination of such issue involves findings of fact which are not to be made on motions for summary judgment, the parties' current motions must be denied and the opportunity given to the parties to investigate this issue further at trial.

Several courts have explored the words "compulsory by law" in the context of marine insurance policies with varying opinions as to the effect these words should be given. A review of these courts' analysis of such language is therefore in order.

In *Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.*, 461 F.2d 500, 504 (2d Cir. 1972), the court construed the term "compulsory of law" to be a "term of art in admiralty law" which specifically required abandonment of the vessel by the owner and the hull underwriter and an express order from a governmental body directing removal. Because in that instance the owner and hull underwriter had not abandoned their vessel nor had a government order directing removal, the court denied recovery under the insurance policy. In the current action, however, both criteria have been met.

The Fifth Circuit Court of Appeals has also had the opportunity to examine the meaning of the phrase "compulsory by law" in the context of marine insurance policies. In *Progress Marine, Inc. v. Foremost Ins. Co.*, 642 F.2d 816 (5th Cir. 1981), *cert. denied*, 451 U.S. 860, 102 S.Ct. 315, 70 L.Ed.2d 158 (1982), the court reviewed the authorities relied upon by the *Jocharanne* court, but rejected the Second Circuit's analysis of the phrase "compulsory by law" as "a term of art"; instead, it adopted an interpretation of such phrase that it described as more consonant with the reasonable expectations of the parties. *Id.* at 820. Beginning its analysis with a review of some general principles concerning construction of insurance policies, the court in

Appendix F

Progress Marine noted that "construing an insurance policy reference must be made to the reasonable expectations of the parties as to the risks and protection against them." *Id.* at 818. Thus, the court concluded that "where removal was reasonably required by law or where failure to remove would have reasonable [sic] exposed an insured to liability imposed by law sufficiently great to justify the expense of removal, then, we believe, such removal could be considered 'compulsory by law' for purposes of recovery." *Id.* at 820.

Likewise, two years later, the Fifth Circuit in *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1369 (5th Cir. 1983), construed the words in the phrase "compulsory by law" in their "plain, ordinary, and popular sense." The court turning to the Random House Dictionary for its analysis stated:

> The Random House Dictionary (8th ed. 1981) defines 'compulsory' in two different senses. One is 'using compulsion; compelling; constraining.' The other is 'required without exception; mandatory; obligatory.' The first sense betokens that compliance is impelled, perhaps by sanctions. The second more closely suggest an unavoidable mandate. The policy does not unambiguously adopt either definition. We must consider not only what is 'compulsory', but also what is meant by compulsion effected by 'law'. *Jocharanne* decided that, as a term of art, the phrase had the second meaning: removal is compulsory by law only when a governmental, or, perhaps, judicial body directs it. Restricting 'compulsion' to the mandate of a governmental

> agency rather than according it the usual significance of the generalized command of a statute or judicial decision narrows the meaning of the term considerably and, we think, unjustifiably.

Id. at 1369.

The court thereafter determined that removal should not be considered compulsory by law only after "a court has rendered judgment requiring it or when an official has issued a fiat." *Id.* at 1370. Rather, in determining whether removal is legally compelled, the court stated that one must look to the state of affairs as they would appear to a reasonable owner under the circumstances.[7] *Id.*

The Third Circuit in *East Coast Tender Service v. Robert T. Winsinger,* 759 F.2d 280 (3d Cir. 1985), similarly rejected the Second Circuit's analysis in *Jocharanne* and adopted the test previously set forth by the Fifth Circuit in *Progress Marine* and *Continental Oil.* Although there was no government order involved in the *East Coast* action, the court held that a P&I insurance policy should not be restricted to situations where there was an express order from a governmental body directing removal and found that such a narrow interpretation could lead to inequitable results. 759 F.2d at 286.

Plaintiff argues that the above cases clearly indicate that "the

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7. While the court in *Progress Marine* had adopted a two-part objective/subjective test for the determination of whether removal was in fact compulsory by law, the *Bonanza* court eliminated the subjective inquiry stage and focused solely on what a reasonable assured would have done, not on the thought process of the actual assured or his counsel on a given day. 706 F.2d at 1371.

mandate of a government agency, a direct command, or an official's fiat would *ipso facto* constitute legal compulsion." Plaintiff's Brief, p. 17. Thus, plaintiff submits that because in this instance it was faced with an order from a government official which appeared to be backed with sanctions and/or fines, as well as requirement that plaintiff repay the Mexican government for its costs of removal if the order was not complied with, removal of the HUICHOL II was "compulsory by law", and it is now "legally meaningless for defendants to claim, in hindsight, that the sanctions *may have been* unenforceable if challenged in a Mexican Court." Plaintiff's Brief, p. 18 (emphasis in original).

In opposition, defendant asserts that the cases which have interpreted the phrase "compulsory by law", have clearly established a balancing test of reasonableness in which three factors: the likelihood of exposure, the sanctions for failure to remove, and the cost of removal, must all be examined in order to determine if removal was, in fact, "compulsory by law". The existence of an order, defendant avers, is but one factor to be considered in the balancing test. And where, as defendant alleges exists herein, the order issued is in fact invalid, the likelihood of exposure to sanctions for failure to remove should be considered a nullity such that it cannot possibly justify any cost of removal for plaintiffs.

Based upon a careful review of the cases cited above, this Court adopts a position somewhat in the middle of the parties' viewpoints and concludes that the determination of whether removal of a vessel was "compulsory by law" must be decided by looking to the state of affairs as they would appear to a reasonable owner under the circumstances and examining whether failure to remove a wreck would likely expose such owner to liability imposed by law sufficiently great in amount and probability of

occurrence to justify the expense of removal. In other words, in this action, would a reasonable owner faced with the Port Captain's Order on December 17, 1985 determine that failure to remove the HUICHOL II would likely expose him to liability imposed by law sufficiently great in amount and probability of occurrence to justify the expense of removal.

This approach differs from plaintiff's version in that the mere existence of an order does not *ipso facto* make removal compulsory by law. Rather, an examination of the Order must be undertaken to determine if a reasonable owner would think that such Order, if not complied with, would likely expose him to liability sufficiently great to justify removal. If, for example, the Order had merely threatened a fifty dollar fine for non-compliance, it would certainly not justify a removal operation estimated to cost several million dollars.[8]

Similarly, this Court's approach stands in contrast to defendant's position in that the actual validity or invalidity of the Order is not dispositive. It is the liability which the Order *appears likely to expose one to* which is pertinent to the determination of whether removal was compulsory by law. It is after all, more probable than not that a reasonable owner faced with that which appears to be a valid removal order threatening substantial penalties and/or fines for noncompliance thereto, would determine that his failure to abide by the terms of such order would likely expose him to significant liability under the law.

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8. Note that defendant's assertion that the plaintiffs merely faced a $20,000 sanction for noncompliance with the Order appears to be a matter in dispute. Plaintiffs claim that in addition to the fine, their noncompliance with the order would have exposed them to liability for the Mexican government's cost of removal, which they estimated to be a very high figure.

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It should be noted at this point that this Court finds defendants' argument that the Order in the current action was so patently invalid on its face that no reasonable owner could believe that failure to comply with such would possibly expose him to any liability belied by the fact that defendants themselves took several months to review the Order trying to determine its validity. Moreover, this is not a situation in which an order was drawn up on the back of a note pad by someone named Atlantis who directed removal of a sunken vessel from his waters. Here, plaintiffs were presented with a formally drawn Order which had the official seal of the Port Captain attached. Whether a reasonable owner of a vessel faced with such order would determine that he was likely to be exposed to liability under the law sufficient to justify his removal costs is a question more appropriately dealt with at trial by the trier of fact.

In addition, in response to defendant's assertion that under the holding in *Bonanza* an invalid order could not create any potential exposure to liability and therefore could not justify any cost of removal, this Court respectfully disagrees with defendant's application of the *Bonanza* decision. In *Bonanza*, the assured, Conoco, removed a wreck which had sunk off the coast of Texas in the midst of an offshore oilfield, claiming that if the wreck moved in a storm and damaged a pipeline Conoco could face an immense adverse potential damage award. 706 F.2d at 1372-1373. Yet, even though the cost of removal was relatively small in comparison to the potential damage award, the court found the removal of the vessel was not compulsory by law in that Conoco's potential liability was too remote. *Id.* The court held that for removal to be compulsory by law there must be a present and unconditional duty. In particular, the court stated that "[t]he possibility that, by an extension of maritime law not yet decreed, Conoco might be held liable in the future should [the vessel] be dislodged from the mud

and propelled against other structures is not such a legal obligation." *Id.* at 1373.

In this action, the presence of a Removal Order from the Port Captain could certainly have created a situation in which a reasonable owner of a wreck felt that a present and unconditional duty existed. In general, failure to comply with a government order exposes one to sanctions for disobedience, *i.e.*, fines, penalties, etc. Moreover, due to the "presumption of validity" which attaches to official acts, a party under a governmental or judicial order is not generally allowed to disobey such while questioning it. *See e.g. Herschensohn v. Hoffman,* 593 F.2d 893, 899 (9th Cir.) *cert. denied,* 444 U.S. 842, 100 S.Ct. 84 (1979) (injunction must be obeyed while objections and questions are presented on appeal); *United States v. McIntire,* 365 F. Supp. 618 (D.N.J. 1973) (presumption of regularity attaches to acts of government officials). This Court, therefore, agrees with the plaintiffs' contention that it is legally meaningless for defendants to claim, in hindsight, that the Order or the sanctions which it threatened may not have been enforceable. The plaintiff's potential for exposure to liability must be viewed in light of the Port Captain's Order which certainly could be viewed as imposing a present and unconditional duty upon plaintiffs.

In sum, since the issue of whether plaintiff's removal of the HUICHOL II was "compulsory by law" depends upon a determination of the reasonableness of plaintiff's conclusion that the liability which it was likely to be exposed to, in light of the Port Captain's Order, justified the expense of removal, this Court believes that this matter is not appropriate for summary adjudication. *See e.g. Progress Marine,* 706 F.2d at 1373 ("Usually a finding that a belief is reasonable would be a finding of fact. . . .") Moreover, because this Court is unpersuaded by defendants'

argument that a technically invalid order would *ipso facto* make the expense of removal unjustified since there could not be any valid sanctions attendant thereto, the issue of the actual validity or invalidity of the Order need not be reached. This Court, therefore, declines to take the opportunity to decide the issue of whether the act of state doctrine would apply to a review of the Order in this instance. In light of such decision, this Court need not address defendants' motion, contingent as it was upon an application of the act of state doctrine, that this matter be dismissed on grounds of *forum non conveniens.*

CONCLUSION

Based upon the reasoning set forth above, plaintiffs' motion for summary judgment is denied; defendants' motion for summary judgment is denied; and defendants' motion for dismissal on the basis of *forum non conveniens* is dismissed as moot.

Dated: August 26, 1988

SO ORDERED:

s/ Alfred M. Wolin, U.S.D.J.
ALFRED M. WOLIN, U.S.D.J.

Supreme Court, U.S.
F I L E D
OCT 14 1994
OFFICE OF THE CLERK

No. 94-207

(2)

In The

Supreme Court of the United States

October Term, 1994

GRUPO PROTEXA, S.A. A COMPANY ORGANIZED UNDER THE LAWS OF THE REPUBLIC OF MEXICO, AND CONDUX S.A. DE C.V., A COMPANY ORGANIZED UNDER THE LAWS OF THE REPUBLIC OF MEXICO,

Petitioners,

vs.

ALL AMERICAN MARINE SLIP, A DIVISION OF MARINE OFFICE OF AMERICAN CORPORATION, A NEW YORK CORPORATION, AFIA, A DELAWARE CORPORATION, AND CIGNA, A DELAWARE CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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9 pp

INTERVENING MATTER

On or about September 15, 1994, the Mexican Ministry of Foreign Affairs ("MoFA") sent a letter to the Legal Advisor of the United States Department of State specifically referencing this matter. On information and belief, a similar letter was sent to the Clerk of the United States Supreme Court on or about October 14, 1994. (A copy of the letter to the State Department is attached as Appendix "A".) The letters unequivocally affirm the Mexican government's determination that the Huichol removal order was a valid exercise of its jurisdiction in its exclusive economic zone under Mexican and international law. The MoFA letters state, in pertinent part that . . .

> . . . for all the reasons stated in the September 15, 1986 opinion letter of the Director General de la Marina Mercante of the Secretariat of Communications and Transport, we respectfully submit that the Mexican government acted within its authority under Mexican and International law, when it ordered Grupo Protexa to raise and remove the Huichol II from the Campeche Oil Fields.[1]

The MoFA letters also contain an independent legal analysis affirming the validity of the removal order and the Mexican government's determination of its jurisdiction under Mexican and international law.

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1. The September 15, 1986 "opinion letter of the Director General de la Marina Mercante of the Secretariat of Communications and Transport" referred to in the MoFA letter is quoted verbatim and discussed at pp. 6 - 8 of the Petition.

SUPPLEMENTAL LEGAL ARGUMENT

The central thrust of the Petitioners' act of state argument is that the Third Circuit's separation of powers analysis was unnecessary and erroneous. International comity and full faith and credit, which remain fundamental underpinnings of the act of state doctrine, required the courts below to defer to the Mexican government's determination that the removal order was valid under Mexican law. The comity considerations implicated in this case are brought into even sharper focus by the MoFA letters. This unequivocal reaffirmation of the Mexican government's determination of the validity of its exercise of jurisdiction should be respected. To do otherwise risks the parochialization of the American legal system.

In addition to buttressing Petitioner's comity argument, the MoFA letters eliminate the foundation upon which the Third Circuit's separation of powers analysis of the act of state doctrine was constructed. The Third Circuit Court acknowledged "that the act of state doctrine arguably is applicable" to the Huichol removal order. Despite Mexico's substantial interest in this case, the Third Circuit held that there must be some showing of a "separation of powers" concern or effect on the "conduct of foreign affairs" that must be demonstrated before the act of state doctrine is triggered. The MoFA letters demonstrate that flouting the Mexican's government's order will have an impact on foreign relations between the respective governments. The MoFA letters point out that the United States is bound not to undermine the United Nations Convention on the Law of the Sea, and that this decision of the Third Circuit casts doubt on the United States' previous position acknowledging Mexico's sovereign rights and jurisdiction to explore, exploit, conserve and manage the natural resources of the exclusive economic zone, where the Huichol sank.

The full significance of the MoFA letters requires some

understanding of the structure of Mexican government. In Mexico, the President of the Republic exercises his authority through the corresponding "Departments of State". These are the United States' equivalent of cabinet level departments. The Mexican Department of State with responsibility for, among other things, administration of the federal maritime zones, including the exclusive economic zone, is the Secretariat of Communications and Transportation. Within the Secretariat of Communications and Transportation, the Department of the Merchant Marine has jurisdiction over maritime accidents and preservation of the marine environment. In 1986, when Petitioners, at the request of the underwriters, asked the Mexican government for clarification of the legal basis for the removal order, the result was the September 15, 1986 letter from the most senior officer in the Merchant Marine. The letter carried the official seal and approval of the Secretariat of Communications and Transportation.

The Ministry of Foreign Affairs is the equivalent of the United States' State Department. Its intervention in this matter is a clear signal that the Mexican Government does not consider this to be merely an issue of an insurance dispute between private parties. The Ministry of Foreign Affairs, like our own State Department, would not intervene in litigation in American courts unless an important national interest was at stake. By way of comparison, the MoFA letter is the equivalent of our own State Department writing the Mexican Supreme Court to establish the validity of a removal order issued by our Coast Guard in our exclusive economic zone incorporating by reference a legal analysis set forth 8 years earlier in a letter bearing the seal of the United States Secretary of Transportation.

From a Mexican standpoint, the Third Circuit decision reflects an official United States' position that the United States does not recognize Mexico's jurisdiction and sovereignty over its exclusive economic zone under Mexican and international law.

The MoFA letters forcefully demonstrate the Mexican Government's disagreement and dissatisfaction with that intrusion by the American court into foreign policy matters of vital interest to both countries. It follows that if a separation of powers analysis of the act of state doctrine was appropriate, Petitioners and the Mexican Government have now demonstrated ample basis for the application of the act of state doctrine. The removal order should be treated as a valid act of the Mexican Government under Mexican and international law without further judicial scrutiny by our courts. It is clear beyond argument that Protexa was bound to comply with the order from its government. Our courts are similarly bound to respect the order, and the government that issued it.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in the Petition, Petitioners respectfully request that this Court grant its petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Grupo Protexa, S.A. and
Condux S.A. de C.V.

Dated: October 11, 1994

SUPPLEMENTAL APPENDIX A — LETTER DATED SEPTEMBER 15, 1994 TO MR. HARPER FROM MIGUEL ANGEL GONZALEZ FELIX

Re: Grupo Protexa, S.A. et al.
vs. All American Marine Slip, et al
Civil Action No. 86-4212

Mexico 15th September 1994.

Mr. Conrad Harper
Legal Adviser of the U.S.
Department of State
Office of the Legal Adviser
U.S. Department of State
2201 C Street, NW
Washington D.C. 20520-6310

FAX (202) 647-1037

Dear Mr. Harper,

We write to comment on a judicial decision recently rendered in a United States Federal Court in the State of New Jersey in the matter referenced above.

The case involved the wreck of the Mexican vessel "Huichol II" in December 1985, which at the time of the incident was owned by Grupo Protexa ("Protexa"), a Mexican corporation. The wreck came to rest approximately 50 miles off the coast of the Port of Carmen, within the restricted zone that surrounds the oil exploration fields that are being developed by Petroleos Mexicanos within the limits of Mexico's Exclusive economic zone ("EZZ") on the sea bed and its subsoil and which in this particular case are on our wide continental shelf, opposite the State of Campeche.

Supplemental Appendix A

For your records I would like you to consider that I am sending to the relevant Court's Clerk a note in the following terms:

> "That for all the reasons stated in the september 15, 1986 opinion letter of the Director General de la Marina Merchante of the Secretariat of Communications and Transport, we respectfully submit that Mexican Government acted within its authority under Mexican and International Law, when it ordered Grupo Protexa to raise and remove the Huichol II of the Campeche Oil Fields".

We could make some specific points to the Court which we hope your Office could support, for example:

The United States of America, after the adoption of the UN. Convention on the Law of the Sea (UNCLOS III), which admittedly, has not yet been ratified, is bound however, not undermine the object and purposes of this Convention. The U.S. Government has raised doubts about certain parts of UNCLOS, but never has the U.S. Government reserved his position regarding neither:

> a) the jurisdiction of coastal States for the protection and preservation of the marine environment (Art 56, b)iii) of the UNCLOS III), including the right of States to take and enforce relevant measures beyond the territorial sea (UNCLOS Art. 221 and others relating to Part XII of the same).
>
> b) the sovereign rights of States to explore, exploit,

conserve and manage the natural resources of the seabed and its subsoil and with regard to other activities for the economic exploitation of the EEZ.

On the other hand, international maritime law has traditionally acknowledged the authority of States over vessels flying its flag, therefore the authority exercised by Mexican authorities should be internationally respected.

Conventions on the High Seas and the Continental Shelf, which the United States has ratified, give ground to assert Mexican authority. Nationally, Mexico's Political Constitution, (Art. 27, paragraphs 4, 5, 6, and 8) as amended in 1976, establishes relevant and consistent principles which are in turn reflected, inter alia, in varios laws such as:

–Ley Regiamentaria del Párrafo Octavo of Article 27 of our Constitution, regarding the EEZ, of 13 february 1976;.

–Ley Federal del Mar (Chapters 4th and 5th, O.J. 8th January 1986);

–Ley General del Equilibrio Ecológico y la Protección al Ambiente, in force since 1988.

Moreover the notion of jurisdiction over vessels flying national flags has never been questioned. This principle is consistent for instance with:

a) Article 5 of the Criminal Code for the Federal District and for the Republic, considers as crimes and offenses those commited by Mexicans or foreigners in the high

seas aboard a national vessel (O. J. 14 August, 1931).

b) Article 169 of the Ley de Vias Generales de Comunicación, grants authority to the Secretariat of Comunicaciónes y Transportes over issues relating to navigation aboard non military Mexican vessels; article. 231 of the Ley de Vias Generalee de Comunicación submits to the national government the authority to inspect Mexican vessels, previous judicial order to do so (Art. 232, IX);
The Ley General de Bianas Nacionales.

c) Art. 2 of the Ley de Navegación y Comercio Maritimo (O.J. 21 november 1963), which states that Mexican vessels in the high seas are considered Mexican territory.

Let me thank you in advance for the attention your office might give to this matter. I hope to be able to see you at the fifth legal advisor's meeting in New York, next October.

Yours sincerely,

s/ Miguel Angel Gonzalez Felix
Lic. Miguel Angel Gonzalez Felix
Consultor Juridico

AMO/GGGG

Supreme Court, U.S.
FILED
OCT 17 1994
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No. 94-207

In The

Supreme Court of the United States

October Term, 1994

GRUPO PROTEXA, S.A., A COMPANY ORGANIZED UNDER THE LAWS OF THE REPUBLIC OF MEXICO, AND CONDUX, S.A. DE C.V., A COMPANY ORGANIZED UNDER THE LAWS OF THE REPUBLIC OF MEXICO,

Petitioners,

vs.

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents, All American Marine Slip and CIGNA ("Respondents"), respectfully submit that Petitioners' framing of the questions presented is somewhat misleading, in that they suggest that Respondents are seeking to litigate issues already decided in Mexican proceedings or that Respondents could have litigated in Mexico. Petitioners' first question is phrased in terms of whether "a U. S. District Court . . . [can] review *de novo* a determination by a foreign government of its authority under its law to issue a coercive removal order. . . . " The use of the term *"de novo"* would seem to imply that the American court was "[t]rying a matter anew . . . as if it had not been heard before and as if no decision had been previously rendered." Black's Law Dictionary 392 (5th ed. 1979). To the extent that Petitioners seek to imply that the Mexican courts or other competent Mexican authorities reviewed the validity of the order, their suggestion has no basis in the record.

In a similar vein, Petitioners' second question suggests that Respondents "were in a position to cause its [the wreck removal order's] validity to be litigated at the time of its occurrence." As will be explained in more detail, Petitioners' statement of the issues ignores the fact that Respondents were *re*insurers, not direct insurers, and had no authority to interfere with Petitioners' handling of the wreck removal, and certainly did not have authority to ask Petitioners to desist from taking actions which the district court found were undertaken for commercial reasons.

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Third Circuit are listed in the caption.

CORPORATE PARTY'S AFFILIATION

Marine Office of America Corporation is a wholly owned subsidiary of the Continental Corporation.

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APPENDIX

Appendix A – Transcript of Proceedings, February 27, 1989, granting Respondents' Motion to Dismiss on Estoppel Issues 1a

STATEMENT OF THE CASE

Certain statements in Petitioners' Statement of the Case are misleading, either because facts are affirmatively misstated, or by way of omission. Respondents will not attempt to restate all the relevant facts, but only to address the inaccuracies in Petitioners' Statement of the Case.

A. The Policy.

Contrary to the Petition, Respondents did not issue an insurance policy to Petitioners, but rather reinsured certain Mexican insurance companies which had in turn insured Petitioners.[1] While this distinction may be subtle, it emasculates Petitioners' argument that Respondents "had the contractual power and opportunity to insist that Petitioners question the validity of the order in Mexican courts." Petition at 18.

The policy does contain a "claims control" clause, which provides as follows:

> Reinsurers [Respondents] hereon shall have control of all claims negotiations and/or decisions and/or settlements hereunder, and their

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[1] The policy defines the "Reassured" as Seguros Monterrey, S.A., Seguros La Commercial, S.A., Aseguradora Del Pais, and Seguros Mutua, S.A. Petitioners are defined as the "Original Assured." Appendix to Brief of Plaintiffs/Appellants Grupo Protexa, S.A. et al; In the United States Court of Appeals for the Third Circuit; No. 93-5332 at A-445 (hereinafter cited as "Third Circuit Appendix").

> decisions shall be final and are binding *upon the Reassured* [Seguros Monterrey, et al].

Third Circuit Appendix at A-450 (emphasis added).

While the claims control clause may have given Respondents the right to insist that the Mexican insurers insuring Petitioners pay or deny the claim submitted to them by Petitioners, nothing in the clause gave Respondents the right to direct *Petitioners* in their handling of the removal operation; Respondents were not in privity of contract[2] with Petitioners and could not legally have insisted that Petitioners contest the wreck removal order in a Mexican court. Moreover, Petitioners admit in their petition that "there were intense social and political pressures for the removal," Petition at 4, and the district court found after the first trial that Petitioners "responded out of moral and commercial necessity," not because of legal compulsion. Appendix E to Petition at 188a. Respondents could scarcely have insisted that Petitioners ignore Petitioners' own legitimate (albeit uninsured) interest in removing the wreck to appease the Mexican state oil company that was Petitioners' only marine construction client, the families of the deceased crewmen, and Mexico's most powerful union to which the deceased crewmen had belonged. Appendix E to Petition at 125a. Accordingly, Petitioners' suggestion that Respondents

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[2] Presumably, Respondents could have raised this issue as a complete defense to Petitioners, and required Petitioners to sue their Mexican insurers. Respondents had no desire to protract this litigation, however, and did not (and do not) interpose lack of privity as a defense.

had the right and the duty to insist that Petitioners contest the validity of the order in the Mexican courts has no basis in the record.

B. The Wreck.

The Huichol II sank 45 miles offshore, well outside of Mexican territorial waters. The wreck lay more than 500 meters from any structure. Trial II, Appendix C to Petition at 84a and 117a. While the Huichol II indeed sank in an area which is marked on nautical charts with the notation "anchorage prohibited," and while some witnesses described this as an "area of extreme safety," these terms have no legal significance under Mexican law. The notation "anchorage prohibited" is inserted on charts by the United States Defense Mapping Agency, but the Mexican government has never designated the area in question as an area where anchoring is prohibited or as an "area of extreme safety" through any statute, regulation, or other official promulgations. Trial II, Appendix C to Petition at 115a; Appeal II, Appendix B to Petition at 33a n.17.

Furthermore, it is highly questionable whether the Mexican government could have designated the area in question as a safety zone without violating international law. Under the United Nations Convention on the Law of the Sea, "[t]he coastal State may, where necessary, establish reasonable safety zones around . . . artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures." Art. 60, ¶ 4, Appendix B to Petition at 64a. However, the

breadth of the safety zones must be declared by the coastal State, "and shall not exceed a distance of 500 metres around them." Art. 60, ¶ 5 (not quoted in Petition); Exhibit 5 to Brief of Defendants/Appellees All American Marine Slip; In the United States Court of Appeals for the Third Circuit; No. 93-5332.

Finally, while the Mexican wreck removal statutes in question are geographically oriented, permitting the government to order the removal of wrecks which sink in "general ways of communication by water", ports, and the vicinity or proximity of a port, there are no Mexican statutes or regulations authorizing wreck removal orders because a ship is located in an "anchorage prohibited zone" or an "area of extreme safety." Any suggestion that the terms "anchorage prohibited zone" or "area of extreme safety" have any legal significance is without any basis in the record.

C. Removal Ordered By Mexican Government.

As noted above, the district court found after Trial I that Petitioners removed the wreck not because of legal compulsion, but because of the intense economic, social and political pressures they faced as a result of the sinking. Petitioners' witnesses admitted at Trial I that this did not constitute legal compulsion required by the policy. Trial I, Appendix E to Petition at 188a.

D. Underwriters' Notice and Agreement.

As noted above, Petitioners' suggestion that Respondents "had a contractual right under the terms of the

Policy at that time to ask Petitioners to make further inquiry into its validity or make a challenge to it in the Mexican courts" ignores the fact that Respondents were *re*insurers of several Mexican insurers, and not direct insurers of Petitioners. It also is an attempt to revive an argument that Respondents should somehow be estopped from contesting the validity of the order, an argument which was directly rejected by the district court on a motion for summary judgment and never appealed. Appendix A to Brief in Opposition.

E. Final Adjustment – "Invalidity" Claim.

In this portion of their petition, Petitioners quote extensively from an "opinion" supposedly issued by the office of the Marine Mercante after being requested "following established administrative procedures." The document was originally obtained by Petitioners in an attempt to convince Respondents to pay the claim, and was attached as an exhibit to Petitioners' motion for summary judgment without authentication.[3] While this document arguably could be considered as some proof of Mexican law under Rule 44.1 of the Federal Rules of Civil Procedure, *see Kalmich v. Bruno*, 553 F.2d 549, 555 n.4 (7th Cir. 1977), there is nothing in the record to suggest that it

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[3] When Petitioners attempted to introduce this document at Trial I, the district court sustained Respondents' hearsay and relevance objections. This ruling was never appealed, and Petitioners made no attempt to introduce the document at Trial II. When Petitioners cited it in the reply brief in Appeal II, Respondents moved to strike the document. The Third Circuit overruled this motion. Appendix B to Petition at 33a n.17.

was obtained pursuant to "established administrative procedures," or that non-lawyer Mexican administrative officials are empowered to opine on the authority of their own departments. On the other hand, Mexico does have a specific judicial procedure, the *amparo*, for testing the extent of administrative authority. Appeal II, Appendix B to Petition at 34a n.19; *see also* James Herget & Jorge Camil, *An Introduction to the Mexican Legal System* 27 (1978). This procedure is frequently used to test the validity of wreck removal orders, Appendix B to Petition at 34a n.19, but was not utilized by Petitioners. Accordingly, the so-called "opinion" scarcely constitutes an "unequivocal affirmation of the Port Captain's authority from the highest levels of the Mexican government . . . . "

REASONS THE WRIT SHOULD BE DENIED

The Third Circuit opinion does not conflict with opinions of this Court or of other courts of appeal. The act of state doctrine as currently applied by this Court requires lower courts to balance the parties' right to their day in court with the Executive Branch's need for flexibility in dealing with foreign states. The Third Circuit conducted the balancing test required by this Court's decisions, and correctly held that the doctrine was inapplicable because the case did not present implications for the Executive Branch's conduct of foreign relations.

The Third Circuit's ruling that an invalid wreck removal order, in and of itself, does not create legal compulsion is consistent with the rulings of all the courts of appeal which have ruled on this issue.

I. ACT OF STATE

The Third Circuit opinion is completely consistent with 30 years of jurisprudence of this Court. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), this Court rejected "an inflexible and all-encompassing" rule to determine when the doctrine applies. *Id.* at 428. In *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990), this Court expressly stated that "even though the validity of the act of a foreign sovereign within its own territory is called into question, the policies underlying the act of state doctrine may not justify its application," and that a balancing approach should be applied "in order to avoid unquestioning judicial acceptance of the acts of foreign sovereigns." *Id.* at 409. As the Third Circuit stated in the *Environmental Tectonics* case, "[f]or this reason, the Supreme Court has not laid down rigid rules to govern the doctrine's application, but leaves it to the lower courts to determine whether a conflict between the judicial and political branches exists in a particular case." *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1058 (3d Cir. 1988).

A majority of the members of this Court have described the act of state doctrine as a choice-of-law rule. *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 705 n.18 (plurality op. per White, J.), 726-78 (Marshall, J., dissenting) (1976). While some of this Court's early act of state cases do use language that might support Petitioners' argument, *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-304 (1918), these cases were decided in the heyday of Professor Beale's "vested rights" theory of conflicts of laws.

See Robert Leflar, *American Conflicts Law* §§ 1, 4 (1986). Accordingly, it is perhaps not surprising that these cases use language consistent with a rigid formulaic approach. Modern, sophisticated choice of law theory is much more flexible, however, and this Court's approach to the act of state doctrine has similarly evolved:

> This Court's description of the jurisprudential foundation for the act of state doctrine has undergone some evolution over the years. We once viewed the doctrine as an expression of international law, resting upon the "highest considerations of international comity and expedience," *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-304 (1918). We have more recently described it, however, as a consequence of domestic separation of powers, reflecting "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder" the conduct of foreign affairs, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

Environmental Tectonics, 493 U.S. at 404. Accordingly, this Court has developed the sensitive balancing test to determine the applicability of the doctrine. The Third Circuit utilized this approach, and found that this case does not implicate the separation of powers concerns underlying the doctrine since adjudication did not pose a potential interference with the Executive Branch's foreign policy prerogative. Petitioners do not even argue that the Third Circuit erred in concluding that there was no potential impact on American diplomacy. This Court need not grant certiorari simply to reaffirm its recent decisions setting forth how the lower courts should determine the applicability of the act of state doctrine.

Nor do Petitioners point to a single case from another court of appeals decided since *Sabbatino* where the court utilized the mechanical formula Petitioners advocate. In the absence of some conflict with another circuit's opinion or an opinion of this Court, there is no need to grant certiorari.

Petitioners' second argument, that separation of powers and sensitive foreign policy considerations are only a consideration when the act of state is arguably offensive to United States or international law, is contrary to this Court's jurisprudence and would create a bizarre anomaly. In *Sabbatino,* this Court expressly stated that "the less important the implications of an issue for our foreign relations, the weaker the justification for exclusivity in the political branches." 376 U.S. at 428. Petitioners would stand this reasoning on its head, and apply the act of state doctrine mechanically to deprive parties of their day in court in those cases where American public policy or international law issues are not present and the application of the doctrine serves no valid interest.

The tenor of the opinions from this Court dealing with the act of state doctrine leaves little doubt that depriving parties of the right to full adjudication via the act of state doctrine is at best a necessary evil. *See Banco Nacional de Cuba v. Sabbatino,* 376 U.S. at 427 ("If the act of state doctrine is a principle of decision . . . compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."); *W.S. Kirkpatrick v. Environmental*

Tectonics, 493 U.S. at 409 ("The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them.") Petitioners would have this Court extend the act of state doctrine to prevent American courts from deciding cases on the merits even where the purpose of the doctrine is not served. There is no need for this Court to grant certiorari to create such an anomalous quirk in the act of state doctrine.

Petitioners' final argument on the act of state doctrine is essentially that by determining whether removal was in fact compulsory by law rather than applying the act of state doctrine to create an irrebuttable presumption of validity, the courts below somehow "abrogated Petitioners' vested contract rights in violation of the Due Process Clause." This theory requires little comment. While the insurance professionals that negotiated the manuscript policy[4] for Petitioners and Respondents were undoubtedly aware of the marine insurance cases construing the term "compulsory by law," Appeal I, Appendix D to Petition at 130a, it is extraordinarily unlikely that non-lawyers would be familiar with a legal concept as esoteric as the act of state doctrine. Accordingly, to suggest that the parties contracted with reference to the possibility that there would be cases where legal compulsion would be presumed and Petitioners would have only to institute suit in the United States to establish a critical element of coverage under the policy strains credulity.

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[4] The policy is composed of manuscript clauses drafted by Petitioners' representative, EII, on EII stationery, and certain form clauses. Third Circuit Appendix at A-445 *et seq.*

Accordingly, there are no constitutional implications in the lower courts requiring Petitioners to prove legal compulsion.

On the other hand, there would be considerable constitutional implications raised by application of an irrebuttable presumption of validity via the act of state doctrine; to deny Respondents the opportunity to defend themselves by showing that removal was not "compulsory by law" within the meaning of their contract would scarcely comport with the requirements of the Fifth Amendment. *See Vlandis v. Kline*, 412 U.S. 441 (1973); *Bell v. Burson*, 402 U.S. 535 (1971); *Tot v. United States*, 319 U.S. 463 (1943); *Heiner v. Donnan*, 285 U.S. 312 (1932). In view of the absence of any issues meriting a grant of Petitioners' petition for certiorari, however, this Court need not face the constitutional implications of the act of state doctrine at this time.

II. COMPULSORY BY LAW

No court that has ever considered the meaning of the term "compulsory by law" typically used in marine protection and indemnity policies as a precondition to liability for wreck removal has even suggested that an invalid governmental order, in and of itself, could constitute legal compulsion. In fact, of all the cases involving this issue, in only one other case, *East Coast Tender Service, Inc. v. Robert T. Winzinger, Inc.*, 759 F.2d 280 (3d Cir. 1985), had a wreck removal order even been issued. The court there did not even consider the validity of the order or whether that would have an effect on whether removal was "compulsory by law." Moreover, that case was from

the same circuit as this case, and thus presents no possibility of an intercircuit conflict. In the absence of some conflict of authority between the circuits, this Court's scarce resources should not be consumed on an arcane question of marine insurance law.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

GRUPO PROTEXA, S.A., a company organized under the laws of the Republic of Mexico, and CONDUX, S.A. de C.V., a company organized under the law of the Republic of Mexico,	:	Civil Action No. 86-4212
Plaintiffs,	:	TRANSCRIPT OF PROCEEDINGS
v.	:	
ALL AMERICAN MARINE SLIP, a New York business organization, and AFIA, a Delaware corporation,	:	
Defendants.	:	

Newark, New Jersey
February 27, 1989

BEFORE:

THE HON. ALFRED M. WOLIN, U.S.D.J.

APPEARANCES:

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Attorneys for Defendants.

Reported by:
CHARLES P. McGUIRE, C.S.R.
Official Court Reporter

* * *

[p. 36] MR. WATSON: Your Honor, in a sense, we're going to have to address the issue of New Jersey law on the estoppel issues, because they switch gears and they say Texas law on the bad faith issues and New Jersey law on the estoppel issues.

THE COURT: I've been through this, reading it. I understand. I'm prepared to decide the estoppel and the tortious interference as well today.

MR. WATSON: Let me, if I may, address the estoppel issues, and again, this will bear on the bad faith questions that have been raised here.

* * *

[p. 41] THE COURT: Thank you.

I'm satisfied that in terms of the choice of law I'm going to apply on the estoppel question, it's going to be Federal maritime law, and I'm satisfied that I will side with the Defendants on this issue, that there will be no estoppel applied to the reinsurance contract, that the contract is what it says it is, cannot be expanded, and therefore, I'll grant the application.

* * *

SUPREME COURT, U.S.
FILED
OCT 25 1994
OFFICE OF THE CLERK

No. 94-207

In The

Supreme Court of the United States

October Term, 1994

GRUPO PROTEXA, S.A., A COMPANY ORGANIZED UNDER THE LAWS OF THE REPUBLIC OF MEXICO, AND CONDUX S.A. DE C.V., A COMPANY ORGANIZED UNDER THE LAWS OF THE REPUBLIC OF MEXICO,

Petitioners,

VS.

ALL AMERICAN MARINE SLIP, A DIVISION OF MARINE OFFICE OF AMERICA CORPORATION, A NEW YORK CORPORATION, AFIA, A DELAWARE CORPORATION, AND CIGNA, A DELAWARE CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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On October 17, 1994, Respondents received the Supplemental Brief in Support of Petition for a Writ of Certiorari filed by Petitioners. This brief is to respond to the matters raised in Petitioners' Supplemental Brief.

I.

THE MEXICAN MINISTRY OF FOREIGN AFFAIRS' CONCERNS ARE BASED ON MISINFORMATION REGARDING THE LOWER COURTS' DECISIONS

The concerns expressed by the Mexican Ministry of Foreign Affairs would appear to be based upon misinformation regarding both the facts of the case and the specific holding of the lower courts. The letter from the Legal Adviser of the Mexican Foreign Ministry to the Legal Adviser of the United States State Department makes repeated reference to the *HUICHOL II* as a "Mexican vessel," Supplemental Brief at 1a, and places great reliance upon the "traditionally acknowledged . . . authority of States over vessels flying its flag . . . . " *Id.* at 3a. While the nationality of the vessel would appear to be irrelevant to the authority of the Mexican government to order wreck removal,[1] Respondents have never questioned the fact that the Mexican government has considerable authority over vessels flying the Mexican flag. The Mexican Foreign Ministry, however, has apparently been

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[1] The two statutes which authorize the issuance of wreck removal orders are triggered by the wreck being located in or near a port or in a "general waterway of communication," and by the wreck "affecting the port" or constituting a navigational obstacle. Article 86 of the Law of Navigation and Maritime Commerce and Article 263 of the Law of General Means of Communication, quoted in Petition at 74a and 76a.

misinformed; the *HUICHOL II* was not a Mexican flag vessel. The record is quite clear that the *HUICHOL II* was registered in Panama. Petition at 70a n.3. Accordingly, the principal basis for the Mexican Foreign Ministry's concerns is based upon misinformation regarding the facts.

The other concern expressed by the Mexican Foreign Ministry is based upon the misconception that the holding of the courts below placed a limitation on Mexico's rights under pertinent international conventions to exercise authority over the outer Continental Shelf and in the Exclusive Economic Zone. However, the Third Circuit expressly stated as follows:

> [W]e are placing no limitations on the scope of Mexican authority in the EEZ. Rather, we only are determining that the Mexican Congress itself did not establish a legal predicate for the order. Thus, instead of attempting to circumvent Mexican law, we honor that law and apply it.

Petition at 34a.[2] Thus, Mexico's concern that the lower courts' decisions in any way express a limitation on Mexico's rights to exercise jurisdiction are unfounded.

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[2] The letter makes reference to a "judicial decision recently rendered . . . in the State of New Jersey," and refers to the cause number in the district court. Thus, it may well be that the author of the letter did not have the opinion of the Third Circuit.

II.

THE MATTERS RAISED ARE IRRELEVANT

The concerns raised by the Mexican Ministry of Foreign Affairs are not only based on misinformation regarding the lower court decisions, but are irrelevant to the issues pending before this Court. The questions presented in the Petition relate to the question of whether the act of state doctrine precludes an American court from reviewing the validity of the wreck removal order under Mexican law, and whether an invalid order, in and of itself, can make removal "compulsory by law" within the meaning of the reinsurance policy at issue. The materials presented in the Supplemental Brief at most question whether the lower courts were correct in their analysis of Mexican law, and indicate that the Mexican government is concerned about the lower court decisions. Neither of these matters is relevant to the issues presented to this Court.

As discussed above, it is not at all clear that the Mexican Ministry of Foreign Affairs disagrees with the lower courts' analysis of Mexican law. In context, the statement that "the Mexican Government acted within its authority under Mexican and International Law" would appear to be based on the misconception that our courts held that Mexico was without authority to pass appropriate legislation regarding the Exclusive Economic Zone. Nothing in the letter even addresses the wreck removal statutes construed by our courts or suggests that our courts improperly construed those statutes. Even if the letter could be construed as disagreeing with the lower courts' analysis of the relevant statutes, however, this

supplemental material would be irrelevant. The Petition expressly states that "Petitioners, though not agreeing, do not challenge the court's analysis of Mexican law." Accordingly, it is simply irrelevant whether the lower courts correctly determined the content of Mexican law.

The material presented in Petitioners' Supplemental Brief probably does evidence that the Mexican government may have concerns about the lower courts' decisions. However, this too is irrelevant to the issues before this Court. First, the applicability of the act of state doctrine does not turn on whether the Mexican government is concerned with the result reached by our courts, but whether adjudication of the validity of the order "would hinder the conduct of foreign relations by the United States government." Third Circuit Opinion, Appendix B to Petition at 33a. The degree of concern expressed by a foreign government is at best a small factor in the overall balancing test required by the decisions of this Court and applied by the lower courts. Moreover, in applying the balancing test, the Third Circuit expressly stated that "we will assume without deciding that it [Mexico] has a substantial interest in this case." Petition at 33a. Petitioners do not complain that the lower courts improperly weighed the various factors, including Mexico's "substantial interest," but rather that the lower courts engaged in a balancing test at all. The extent of Mexico's concern about our courts' adjudication of the validity of the order is thus irrelevant to the issues presented.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the materials raised in the Supplemental Brief do not raise an issue meriting this Court's exercise of discretionary jurisdiction to review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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(5)

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October Term, 1994

GRUPO PROTEXA, S.A. A COMPANY ORGANIZED UNDER THE LAWS OF THE REPUBLIC OF MEXICO, AND CONDUX S.A. DE C.V., A COMPANY ORGANIZED UNDER THE LAWS OF THE REPUBLIC OF MEXICO,

Petitioners,

vs.

ALL AMERICAN MARINE SLIP, A DIVISION OF MARINE OFFICE OF AMERICAN CORPORATION, A NEW YORK CORPORATION, AFIA, A DELAWARE CORPORATION, AND CIGNA, A DELAWARE CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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5 Pl

A. Summary of Reply.

The Court directed Respondents to brief the substantive legal issues raised in the Petition. Instead, Respondents ignored the legal arguments in the Petition and created factual smoke screens intended to obfuscate rather than frame the dispositive legal issues. Accordingly, further legal argument is unnecessary, and only brief factual clarification is required.

B. The "Anchorage Prohibited Zone".

The first smoke screen submitted in Respondents' opposition brief, is the suggestion that it is "questionable" whether Mexico had the right under international law to designate a "safety zone" around the concentration of oil platforms and pipelines in the area where the Huichol sank. Even if it were so, the point is legally meaningless.[1] The Third Circuit ruled that the order was invalid under Mexican, not international law. Respondents simply ignored Petitioners' argument that the comity underpinnings of the act of state doctrine require an American court to presume the validity of a foreign sovereign's act under that foreign sovereign's law.[2]

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1. It should be noted that all of the international marine chartmakers, including the U.S. Defense Mapping Agency and the British Admiralty, not merely the government of Mexico, designate a zone around the core of the Campeche oil field operations where mariners are warned to exercise extreme caution due to the network of substantially uncharted pipelines located there.

2. In any case, Mexico's jurisdiction under international law to order the removal of the wreck is not premised on the "safety zone" designation. Rather, it is found in the United Nations Convention on the Law of the Sea Treaty which grants Mexico sovereignty and jurisdiction in its Exclusive Economic Zone (within which the Huichol sank by a margin of over 150 miles) for purposes of preserving, protecting, conserving and managing the natural resources in the zone.

C. The Mexican Act of State.

The second specious suggestion by Respondents is that the courts below did not review *de novo* a determination by competent Mexican officials. Respondents have never before suggested or argued that the removal order was not an act of the Mexican Government. It is and has throughout this litigation been undisputed that the removal was ordered by a Mexican governmental official, acting in his official capacity as a representative of the Marine Mercante Department of the Secretariat of Communications and Transportation. The legality of the act was affirmed by the general director of the Marine Mercante, and the Legal Advisor to the Mexican Ministry of Foreign Affairs. Moreover, as set forth in the Petition, the trial court expressly found that the port captain was acting as a representative of the Mexican Government. That finding was not appealed.

D. Respondents Were Direct Insurers.

Finally, it is preposterous for Respondents to now claim that they did not have the right or opportunity to cause the validity of the removal order to be questioned prior to the completion of the removal operation. For the almost 10-year history of this case, Respondents have conceded that the Policy was in substance a direct form of insurance between Petitioners and the Policy underwriters, including Respondents. Respondents adopted this position for their own benefit. If it were in fact a true reinsurance policy, Respondents would have been bound by the Mexican underwriter's admission of liability. That is why, as conceded in footnote two of the opposition brief, Respondents never before raised lack of privity as a defense.[3]

---

3. The only reason the Mexican underwriters are identified as the "assureds" under the Policy is because under Mexican law in effect at the time,

(Cont'd)

It must also be observed that regardless of whether there was a claims control clause in the Policy, from a practical standpoint Respondents' claim that they did not have the opportunity or right to cause the validity of the removal order to be challenged is simply absurd. As set forth in the Petition, Respondents had two surveyors representing their interests on-site during the removal operation. Despite complete knowledge of what was happening during the entire removal operation, neither Respondents' on-site representatives nor the home office representatives ever queried the validity of the Removal Order, or suggested that Petitioners should make further inquiry into its validity, or challenge it. Instead Respondents remained silent and passive while Petitioners attempted, under extremely difficult conditions, to minimize the loss to all of the underwriters, including Respondents. Respondents should not now be heard to claim they are being deprived of an opportunity to challenge the validity of the order with Mexican law.

(Cont'd)
insurance contracts had to be placed with a Mexican insurance company. No Mexican underwriter, however, had the capability to underwrite the risks presented here. To overcome that problem, Petitioners negotiated the terms of the Policy directly with the Policy underwriters. Once the terms and conditions were agreed upon, the Policy was placed with the Mexican underwriters, who simultaneously laid off 95% of the risk on the American and English underwriters. By retaining 5% of the risk, the Mexican underwriters remained as nominal insurers and satisfied the statutory requirements. All communications and negotiations before and during the life of the Policy, however, were directly between Petitioners and the Policy underwriters, including Respondents. In sum, the form of the Policy was merely a convenient formality — all parties to it, including Respondents, recognized that the substance of the contractual relationship was insuror-insured.

E. Conclusion.

For the foregoing reasons, as well as the reasons stated in the Petition and Supplemental Brief, Petitioners respectfully request that this Court grant its petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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